Office-Supreme Court, U.S.
FILED
SEP 10 1964
JOHN F. DAVIS, CLERK

# In the Supreme Court of the United States

No. 478
OCTOBER TERM, 1964.

THE OTTAWA TRIBE and GUY JENNISON, BRONSON EDWARDS, and GENE JENNISON,
As Representatives of THE OTTAWA TRIBE,
*Petitioners,*

vs.

THE UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI
**To the United States Court of Claims.**

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## PETITION FOR WRIT OF CERTIORARI
**To the United States Court of Claims.**

The Ottawa Tribe of Oklahoma, and its representatives Guy Jennison, Bronson Edwards and Gene Jennison respectfully petition for a writ of certiorari to review the judgment of the United States Court of Claims.

## OPINIONS BELOW.

The three opinions of the Indian Claims Commission are reported as follows:

Opinion of June 29, 1960 (App., *infra*, p. 1a) is reported at 8 Ind. Cl. Comm. 874.

Opinion upon motion for Rehearing, March 10, 1961 (App., *infra*, p. 26a) is reported at 9 Ind. Cl. Comm. 98.

Opinion of November 26, 1962 (App., *infra*, p. 34a) is reported at 11 Ind. Cl. Comm. 566.

The opinion of the Court of Claims is set forth in the Appendix, at page 45a.

## JURISDICTION.

The final judgment of the Court of Claims was entered July 12, 1964. (App., *infra*, p. 45a.)

The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1) and Section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U. S. C. 70s.

## QUESTION PRESENTED.

(a). Where the United States by agreement in a treaty with an Indian tribe, provides for an express educational trust of a portion of the tribe's lands, under which the trustees were to sell 15,000 acres and perpetually invest the proceeds in first mortgages and to use the income only to support of the school which was the object of the treaty provisions, and where

(b) these trust duties were not performed and it has been held that the failure to require such performance made the United States liable under the Indian Claims Commission Act,

Is the Indian tribe entitled by way of damages not only to an amount equivalent to the unaccounted-for proceeds of the sale of the 15,000 acres, but also to compensation for nonperformance of the covenant providing for investment of such proceeds in first mortgages?

Or, does such compensation for non-investment fall within the frequently-applied prohibition against payment of interest by the United States?

## TREATY PROVISION INVOLVED.

The pertinent portions of the Treaty of June 24, 1862, 12 Stat. 1237, are as follows:

"ARTICLE VI. The Ottawas deeming this a favorable opportunity to provide for the education of their posterity, and feeling that they are able to do so by the cooperation of the United States, now, in pursuance of this desire of the Ottawas, after the selections and allotments herein provided have been made, there shall be set apart, under the direction of the Secretary of the Interior, twenty thousand acres of average lands for the purpose of endowing a school for the benefit of said Ottawas; also one section of land, upon which said school shall be located, which section of land shall be inalienable, * * *.

Five thousand acres of said land may be sold by the trustees hereinafter named, the proceeds of which may be devoted to the erection of proper buildings and improvements upon said section for reception of the pupils; and the residue of the school lands may, in like manner, be sold from time to time, as full prices can be obtained for the same. The money received therefor shall be loaned upon good real estate security, to be improved farms in the county of the reservation, the same not to be a security for more than half the appraised value of the land as returned by the county assessor, and no land to be taken as security for such loan or loans which shall be encumbered in any manner, or the title to which shall have been derived from or held by any judicial, administrator, or executor's sale, or by the sale of any person acting in a fiduciary capacity. The security shall never be avoided on account of any rate of interest reserved, and the interest only shall be applied to the support of the school, so that the principal sum shall never be diminished.

* * * * *

John T. Jones, James Wind, William Hurr, Joseph King, who are Ottawas, and John G. Pratt, and two other citizens of Kansas, who shall be elected by the said Ottawa Indians, are, by the parties agreed, to be trustees to manage the funds and property by this article set apart. They and their successors shall have the control and management of the school, and the funds arising from the sales of lands set apart therefor, and also the reserved sectior whereon the school is situated. Upon the death, resignation, or refusal to act, by either of them, the vacancy shall be filled by the survivors, provided that the board of trustees shall always have three white citizens members of said board.

* * * * *

A majority of the trustees shall form a quorum to transact business, but there shall be two of the white trustees present at the transaction of business. * * *

* * * * *

And it is hereby expressly provided and agreed that the children of the Ottawas and their descendants, no matter where they may emigrate, shall have the right to enter said school and enjoy all the privileges thereof, the same as though they had remained upon the lands by this treaty allotted."

## STATEMENT.

By the Treaty of June 24, 1862 the Ottawa Indians disposed of their Kansas reservation of 74,000 acres, setting aside, however, 20,640 acres to create and to endow permanently a school for the children of the tribe. The school was to be managed by a board of seven trustees, to be composed of four Indians and three white citizens. The trustees were empowered to fill vacancies in the

board, but the presence of two white trustees was required for the transaction of any business.

From their very first act, the trustees consistently violated their trust duties, turning the proposed Indian school almost entirely into a white university, and using the school lands as the assets upon which to base the successful townsite speculation which resulted in the present municipality of Ottawa, Kansas.

The treaty provided that the 15,000 acre residue of the school lands (20,640 acres less the 640 acre school site and less the 5000 acres to be sold to build the school building) should be sold at full prices, and the money invested in first mortgage loans upon lands in the county and

> "the interest only shall be applied to the support of the school, so that the principal sum shall never be diminished."

The economic value of these 15,000 acres was ultimately entirely diverted from the school for Indians, and the Indian Claims Commission awarded damages totalling $75,577.42 as the contemporary value or proceeds received for the 15,000 acres. (App. p. 44a, Items 3, 6 and 9, of Final Award.) The Commission awarded no further damages, either by way of interest or otherwise, for failure to invest the proceeds of the 15,000 acres for the benefit of the Indians.

The Ottawas appealed to the Court of Claims (among other matters) from the Commission's denial of damages for the non-performance of the treaty obligation to invest the proceeds of the land, such damages as a practical matter to be measured by the award of interest. The Court of Claims rejected this phase of the Indians' appeal, and this rejection is the basis of the present petition for a writ of certiorari.

## REASONS FOR GRANTING WRIT.

The ruling of the Court of Claims in this case, it is submitted, illustrates the need for a pronouncement by this Court guiding the application of the principles governing interest upon claims against the Government, to the particular and unique provisions of the Indian Claims Commission Act, Act of August 13, 1946, 60 Stat. 1049, 25 U. S. C. 70. Many pending Indian claims involve this problem, which has to date not been ruled upon by this Court. Principles stated by the Supreme Court in cases involving other legislation, usually specific jurisdictional Acts of Congress, have been with reluctance applied to cases arising under the Indian Claims Commission Act, and in this particular case, clearly misapplied.

### (a) The Announced Doctrines.

As a corollary to the doctrine of sovereign immunity, the general principle has long been announced that the United States, although authorizing suit to be brought against it, is not liable for interest upon any claim unless Congress says it is. The most recent pronouncement of this doctrine by this Court, dealing however with a statute significantly differing from the Indian Claims Commission Act, is found in the case of *United States v. Alcea Band of Tillamooks, et al.*, 341 U. S. 48 (1951). Here the Court said, *per curiam*,

> "It is the 'traditional rule' that interest on claims against the United States cannot be recovered in the absence of an express provision to the contrary in the relevant statute or contract. 28 U. S. Code (Sup. III). Sec. 2516(a) *United States v. Thayer-West Point Hotel Co.* 329 U. S. 585, 588 (1947) and cases cited therein. This rule precludes an award of interest even though a statute should direct an award of 'just com-

pensation' for a particular taking. *United States v. Goltra* 312 U. S. 203 (1941). The only exception arises when the taking entitles the claimant to just compensation under the Fifth Amendment. Only in such cases does the award of compensation include interest. *Seaboard Airline Railroad Co. v. United States*, 261 U. S. 299 (1923); *U. S. v. Thayer-West Point Hotel Company, Supra.*"

It is apparent from the decided cases that the foregoing doctrine does not rest solely upon the provisions Section 2516(a) of the Judicial Code referred to in the quotation, but that the same restriction exists at common law. With reference to Section 2516(a), there is grave doubt whether this section applies to judgments rendered by the Indian Claims Commission, since it specifically provides:

"2516. INTEREST ON CLAIMS AND JUDGMENTS.

(a) Interest on a claim against the United States shall be allowed in a judgment of the Court of Claims only under a contract or Act of Congress expressly providing for payment thereof."

Inasmuch as the Court of Claims exercises appellate and not original jurisdiction under the Indian Claims Commission Act, the wording of Section 2516(a) would seem inapplicable. Therefore, the common law doctrines would form the proper frame of reference for a decision respecting the Indian Claims Commission Act.

The Court of Claims has, with reluctance, applied the above doctrines to appeals from the Indian Claims Commission. In the case of *Loyal Band or Group of Creek Indians v. United States*, 118 C. Cls. 373, 383, 97 F. Supp. 426, 431 (1951), the Court of Claims said:

"The plaintiffs claim interest on the $600,000 from the time of the Senate's determination down to

date, saying that the 'fair and honorable dealings' clause of Section 2 of the Indian Claims Commission Act of August 13, 1946, authorizes the award of interest. The plaintiffs say that Section 2516(a) of the Judicial Code, 28 U. S. C., which forbids the allowance of interest on a claim against the United States, unless the interest is agreed to by contract or is authorized by an Act of Congress, applies only to judgments of this Court, and does not forbid the Indian Claims Commission to award interest. The Government says that Section 2516(a) is merely declaratory of a generally applicable doctrine making the Government immune from interest. It cites *United States v. Goltra*, 312 U. S. 203, 207, 61 S. Ct. 487, 490, 85 L. Ed. 776, where it is said that Section 2516(a), then Section 177 of the Judicial Code, 'accords with the traditional immunity of the Government from the burden of interest unless it is specifically agreed upon by contract or imposed by legislation.' It cites *United States v. New York Rayon Co.*, 329 U. S. 654, 67 S. Ct. 601, 91 L. Ed. 577, and *Albrecht v. United States*, 329 U. S. 599, 67 S. Ct. 606, 91 L. Ed. 532, indicating the Supreme Court's adherence to the view that the Government need not pay interest.

"If it were not for these emphatic expressions of the Supreme Court, we would be inclined to think that such a departure from fair and honorable dealing as is shown by the Government's failure, for some forty-seven years, to pay a definite sum which it had agreed to pay, would require it to compensate the plaintiffs by paying it interest. In deference to the views of the Supreme Court, we do not so decide."

It is submitted that there exist two substantial reasons in support of the obvious reluctance of the Court of Claims to apply the accepted interest doctrines to a case under the Indian Claims Commission Act.

**(b) Why Interest Should be Permitted Under the Indian Claims Commission Act.**

The first reason lies in the nature of the Act itself.

Ordinarily, under the common law rules set forth in prior decisions of this Court, no intention to permit the award of interest to a claimant can be *implied* from the words used by Congress. The payment of interest must appear expressly in the contract, statute, or treaty under the decisions. (Likewise, if this were a case governed by the specific provisions of Section 2516(a) of the Judicial Code, that statute would require an express commitment to pay interest.)

However, in none of the other situations where it was held that the intent to pay interest could not be implied, did the Court deal with a statute as all-embracing as the one here involved.

The all-inclusive intention of Congress to redress all types and varieties of wrongs to Indian tribes, is indicated in the authority granted the Indian Claims Commission to hear and determine:

> "* * * (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President;
>
> "(2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit;
>
> "(3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity;

"(4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and

"(5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity * * *." 25 U. S. C. 70a.

If ever there were a situation dictating the consideration of a departure from the requirement at common law of an "express" consent by Congress for the award of interest, it is submitted that the foregoing words create such a situation. The words of clause (2) themselves would almost seem to include interest, since interest is a legal claim ordinarily cognizable by the United States courts. Likewise, clause (5), as indicated by the Court of Claims, is so broad as to be partially defeated by the application of the requirement of an "express" mention of interest in the Act of Congress.

Because the intention of Congress to redress all possible wrongs of all possible kinds is so clearly apparent in the Act, it is submitted that a legal equivalent of an express authority to award interest has been achieved, and that interest is an appropriate remedy in this instance.

The second reason for questioning the application of the usual concept of interest to the cases under the Indian Claims Commission Act lies in the Constitutional exception that interest, although not expressly provided for, is nevertheless allowable where there is an expropriation or taking of property under the Fifth Amendment—in other words, where the Government is exercising its power of eminent domain. From the cases cited above which discuss this exception, it is apparent that the element which essentially distinguishes such a "taking," is the fact that

the taking occurs regardless of the lack of consent of the owner of the property. The owner has no freedom of choice.

It is submitted that cases involving Indian treaties of cession which are brought under the Indian Claims Commission Act, should be individually and carefully examined to determine whether or not, below the surface, the Government was actually using the making of a treaty as a form of eminent domain procedure. In many instances the Indians, because of the pressure of the whites, literally had no choice except to enter into a treaty of cession. We believe the record in this case will show that the white demand for Kansas land and the announced Government policy of moving the Indians out of Kansas made inevitable the requisition of the Ottawa reservation.

As an extreme example of using a treaty procedure to effect an expropriation of Indian land, one need look no further than the most famous Indian treaty of all time, the 1795 treaty of Greenville, 7 Stat. 49, by which the Americans obtained from the Indians substantially all of the lower half of Ohio, following the defeat of the Indian confederacy by General Anthony Wayne at the battle of Fallen Timbers. Here was the true situation not really expropriation by force, even though a formal consent was obtained to the *fait accompli*?

Many of the cases before the Indian Claims Commission similarly amount to actual expropriation by the Government against Indian consent--even though a treaty was signed. In many instances, there was no alternative available to the Indians.

A second reason, therefore, for the payment of interest lies in the fact that, in many cases, treaties of cession were actually takings within the purview of the Fifth Amendment.

Thus the decided cases of this Court, when applied to the special language of the Indian Claims Commission Act, and to many of the special situations surrounding Indian treaties of cession, produce a result inconsistent with the basic principles upon which those cases were originally determined. The existing cases simply fail to furnish appropriate or adequate tools to apply the interest rules to the Indian Claims Commission Act.

**(c) Application to the Circumstances of This Case.**

If this Court were to determine either that the Indian Claims Commission Act permitted, because of its language, the award of interest, or that in this instance the treaty of cession involved an unconstitutional taking, the ruling of the Court of Claims would require reversal.

But in addition, the actual words of the treaty of June 24, 1862, *expressly* calling for investment of the school funds, create a further ground in this case for awarding, not interest, but damages measured by interest. The Court of Claims, in its almost automatic denial of all rights to interest under the Act, failed to observe that payment of a return upon the funds, in effect, was expressly provided for in the Treaty of June 24, 1862 between the United States and the Ottawa Indians. In other words, the treaty to which the United States was the only other contracting party contained a covenant that the endowment fund of the Ottawa school, realized out of the 15,000 acres of Ottawa land set aside for that purpose, should be permanently invested in selected first mortgage loans in Franklin County, Kansas in order to produce income.

Petitioners below demanded damages for the failure to carry out that portion of the trust created by the treaty. Unfortunately it is impossible, after all the intervening years, to prove what the income would have been if the

funds had actually been so invested, how many mortgages would have been foreclosed, what rates of return would have been received, and the like.

The only practical way to make any reasonable measure of the petitioners' loss from non-investment is to apply a rate of interest to the proceeds of the lands. Such an interest rate is used only as a measuring stick for damages for failure to invest. It does not constitute interest in the sense of compensation solely for the delay of justice. Yet because the word "interest" appears as a measure of damages, the Court of Claims automatically struck down a valid claim.

What was the pertinent language used by the Court of Claims in rejecting petitioners' claim for compensation for breach of an express provision of the treaty?

The Court of Claims in this case disposed of the Ottawa claim that damages should be awarded for the non-investment of the school endowment funds simply by saying (Opinion, App. pp. 49a, 50a):

> "Appellant contends that the following modifications of the Commission's final award should be adopted by this court:
>
> (A) To increase the award * * *
>
> (B) To increase the award * * *
>
> (C) To add an amount * * *
>
> (D) To award additional damages, to be measured by appropriate interest rates, on that portion of the award which represents the proceeds of the sale of the 15,000 acres intended as an endowment for the school.
>
> We conclude that appellant has not made out its case with respect to the last three contentions above. Therefore, we affirm the final award with respect to these items, based on the reasons adequately stated in the opinions of the Commission below."

The Court of Claims thus adopted the reasoning of the Indian Claims Commission.

What does the Indian Claims Commission cite as the reasons for rejecting contention (D)—the present claim?

First, the Commission's words with respect to the basis of the awards in this case are:

> "It is for all the reasons hereinbefore stated that the Commission concludes that the United States was morally obligated in negotiating the 1862 treaty with the Ottawa Indians to see to it that ample safeguards in the way of supervision and control of the educational trust by the Government were provided in the treaty. The failure to provide these safeguards resulted in a loss to the Ottawa Indians because of the violations of the trust by the trustees. * * *" (Appendix, p. 10a.)

With respect to Claim D above, as well as other claims, the Commission says:

> "Interest is not allowed on the other sums petitioner is herein found entitled to recover since the duty owed petitioner in respect to those transactions is based on a moral obligation to protect the Indians and their property and recovery is allowed under clause (5) of Section 2 of the Indian Claims Commission Act. *Osage Tribe v. United States,* 119 C. Cls. 592; 672; *Loyal Creek Indians v. United States,* 118 C. Cls. 373, 383." (Appendix, p. 24a.)

Thus merely by lumping the specific Ottawa claim for failure to invest the endowment funds under the heading of "interest," and disposing of such "interest" by automatically following a supposed mandatory general rule, the tribunals below have deprived the petitioners of their rights.

Where the Commission found in the United States a moral obligation to see to it that "ample safeguards in the way of supervision and control of the educational trust by the Government were provided in the treaty," does not that duty require safeguards also to insure the promised investment of the funds?

In summary, merely because of the belief that the cases decided by this Court categorically forbid interest when the claim is founded upon the "fair and honorable dealings" clause of The Indian Claims Commission Act, the petitioners were denied any relief for the failure to receive the performance of a specific provision of the treaty.

## CONCLUSION.

In interpreting the rules heretofore laid down as inflexible and all-defeating criteria, the Courts below have demonstrated an imperative need for the elimination of a shotgun interest rule and for the formulation by this Court of a sensitive and logical standard to the many cases now pending under the terms of the Indian Claims Commission Act.

For the foregoing reasons it is respectfully submitted that this petition or a writ of certiorari be granted.

LOUIS L. ROCHMES,
ALLAN HULL,
*Attorneys for Petitioners.*

# APPENDIX.

## OPINION OF THE INDIAN CLAIMS COMMISSION.

(Decided: June 29, 1960.)

HOLT, Commissioner, delivered the opinion of the Commission.

Petitioner herein is The Ottawa Tribe of Oklahoma, a tribe organized under the Oklahoma Welfare Act (49 Stat. 1967). It comprises and represents bands of Ottawa Indians formerly known as the Ottawas of Blanchards Fork and Roche de Boeuf. Defendant admits petitioner has the capacity to maintain this suit.

These bands of Ottawa Indians at one time resided in the State of Ohio. By the Treaty of August 30, 1831 (7 Stat. 359), they ceded to the United States certain lands they then held in that State and agreed to move west to a new reservation in Indian Territory (now Kansas). The Ottawas moved to this new location and commenced to progress on a tract of some 75,000 acres in what is now Franklin County, Kansas.

The claim presented by petitioner arises out of the two treaties concluded by the Ottawa Tribe with defendant on June 24, 1862 (12 Stat. 1237) and February 23, 1867 (15 Stat. 513, 517) which provided, among other things, for allotments in their Kansas Reservation to members of the Tribe, and for the setting apart of some 20,640 acres of the tribe's land for the purpose of endowing a school for the benefit of the Ottawas; and for the sale of the remainder of the tribe's lands at the best price obtainable. Petitioner seeks to recover the benefits of the educational trust of which they allegedly were deprived by fraud and mismanagement, and for certain trust funds from the sale of the remainder of its reservation lands alleged to have been withheld from them, and either embezzled or used unlawfully.

With the passage of time the ever westward surge of settlement began to bring demand for the opening of Indian country to white settlers. In 1853, Congress authorized negotiations with the Indian tribes west of the States of Missouri and Iowa for the purpose of opening the lands to white settlement by extinguishing the title of the Indians to all or part of their lands. A number of the tribes, by treaties in 1854, gave up part of their lands and reserved the remainder. The Kansas-Nebraska Act of 1854 (10 Stat. 277) established Kansas and Nebraska Territories, and provided for territorial governments. With the extinguishment of Indian title to part of the lands in these new territories, settlement of the eastern portion of the lands in the former Indian country came quickly.

Ceded Indian lands bordered the Ottawa reservation on the north, east and south.

The Ottawa Indians, who primarily lived by cultivating the soil, had made fine progress on their reservation where they were said to have lived in comfortable homes and had good farms. In 1854, they decided not to dispose of any of their lands. They were said to be considering dividing their lands equally among themselves and becoming as soon as possible citizens of the United States. With the settlement of the country around them these Ottawas in a few years realized the necessity, in order to protect their property, of holding their lands in severalty. In 1859, they proposed a treaty which would permit allotment of their reservation lands and the cession of the balance in trust to the United States to be sold for their benefit. They proposed $40,000.00 of the proceeds be set apart and the interest used to support a school for their children for twenty-five years and longer and that, if thought advisable by the Secretary of the Interior, the treaty should provide the Ottawas would become citizens

five years after ratification of the treaty. In March 1860, the Indians again suggested a treaty providing for a division of their lands and sale of the balance for their benefit after allotments. No action, apparently, was ever taken by the Government on these proposals.

At this point the stage appears to have been set for the first act that led to the treaty dealing with the Ottawa lands. In December 1860, a letter was sent to the Commissioner of Indian Affairs signed by John T. Jones and William Hurr for the Ottawa Indians and I. S. Kalloch for the Board of Trustees of "Roger Williams University" and "Company." This letter proposed a treaty be made by which the Ottawa Indians, after allotments to members of the tribe and certain grants, would give to the trustees of Roger Williams University 20,000 acres of their land provided the trustees within two years expended "$10,000.00 in buildings and otherwise" towards the education of the Ottawa children. It also was proposed that said trustees thereafter would board, clothe and educate not exceeding fifty Ottawa children annually for 30 years and after that period 10 scholarships were to be furnished the Ottawas at the University forever.

This letter of December 1860 also contained the offer of the Ottawas to sell the remaining portion of their reserve to a "Company," said company agreeing to work with the Board of Trustees, for $2.00 per acre to be paid in equal payments over a four year period. The letter indicates that it was contemplated a town-site was to be chosen and the lands around it, aside from that reserved for the college, of eight contiguous sections were to be owned one-half by the trustees and one-half by the company.

The proposals set forth in the December 1960 letter to the Commissioner of Indian Affairs are important and enlightening as we come to examine the provisions of the

Treaty of June 24, 1862 (12 Stat. 1237, II Kapp. 830), and the subsequent events relating to the disposal of the Ottawa lands. Two white persons whose names are mentioned in the letter were to become deeply involved in the handling of the Ottawa property following the 1862 treaty. One was the signer of the letter for the Board of Trustees of the "University" and the "Company," Reverend I. S. Kalloch. The other named in the proposal as a member of the company was C. C. Hutchinson. In the period intervening between the writing of this letter and the negotiation of the 1862 treaty, the same Hutchinson managed to become Indian Agent for the Ottawas and was present when the treaty was made in Washington, D. C. The record also shows that as of the date of the 1860 letter, and even at the date of the treaty, the "Roger Williams University," later to be known as Ottawa University, was an ethereal institution. It was an institution on paper only with no tangible assets, and with little prospects unless lands were obtained from the Ottawas.

By the Treaty of June 24, 1862, it was provided that allotments would be made to all members of the tribe and certain special grants were made to designated individuals and the Baptist Church. The Treaty provided also that 20,640 acres were to be set aside for the permanent endowment of a school for the benefit of the Ottawas (Article 6). To manage the funds and property which would be involved in this endowment the treaty provided for seven trustees. Five were named in the treaty and the other two, who were required to be white citizens of Kansas, were to be elected "by said Ottawa Indians." Four of the five named in the treaty were Ottawa Indians, the fifth was John G. Pratt, United States Indian Agent for the Delaware Indians. Three of the four Ottawa trustees were members of the Ottawa Tribal Council. Of the acre-

age so set apart 640 acres was the school site. Of the remaining 20,000 acres it was provided 5,000 acres might be sold by the trustees to secure funds for the erection of buildings and improvements on the school site. The balance of 15,000 acres was to be sold by the trustees, the proceeds invested, and the interest only to be applied to the support of the school.

The 1862 treaty fails to mention "Roger Williams University," which will hereinafter be referred to as Ottawa University since the name was soon so changed. The striking similarity between the provisions of the treaty in some respects and the 1860 letter leaves no doubt but that the backers of the ethereal institution were successful in obtaining the lands needed to go ahead with their project. As the events following the treaty are set forth herein, it will be seen that the originators of the University project and the "Company" mentioned in the same 1860 letter soon were able to commence on the plans they had formulated in 1860.

Soon after ratification of the 1862 treaty, the Indian trustees elected two white members to the Board. They were C. C. Hutchinson, the Indian agent, and as previously noted a member of the "Company" which in 1860 proposed to purchase the Ottawa lands, and John W. Young, Hutchinson's father-in-law. At this meeting, Pratt being absent, the board elected officers and transacted one item of business. The board contracted to sell to Young, the trustee, 5,000 acres at a price of $1.25 per acre to be paid in cash or by erecting school buildings satisfactory to the board. A deed was issued about four months later to Young for a 640 acre tract for $800 by the Treasurer of the Board, John T. Jones. By this time Young was no longer a resident of the State of Kansas, if, in fact, he had ever been one. Young conveyed this 640 acre tract to

Hutchinson before approval of the sale by the Secretary of the Interior and before the patent was issued. This 640 acre tract was the townsite of what became known as Ottawa, Kansas. There can be little doubt that this was the townsite planned by the "Company" mentioned in the 1860 letter. So the real estate speculation which clearly was the main purpose of those whites who were part of the 1860 proposal began to materialize. Hutchinson according to the deed records conveyed the townsite to the Ottawa Town Company, of which he was an officer for a stated $10,000.00. It is questionable whether he actually received such a sum of money or whether he received certain interests in the Town Company. Also an officer of this company was none other than the signer of the 1860 letter, the Reverend I. S. Kalloch. At the second meeting of the Board of Trustees of Ottawa University, this same Kalloch was elected a trustee to replace Young who it was presumed had resigned. Kalloch became the assignee of Young under the contract to purchase the $5,000 acres and later received the patent to the remaining 4,348.79 acres which for the most part were selected from school lands surrounding the school site and the townsite which was similar to the plan set forth in the 1860 letter. Their plan for development of the townsite was remarkably successful for by October of 1864 (patent was issued in May 1864) a thriving village was located on the 640 acre tract and it had become the county seat. Kalloch upon issuance of a patent for the remainder of the approximately 5,000 acres sold by the trustees was soon thereafter in business selling these lands surrounding the school and town sections at a profit.

Trustee Pratt, Indian agent for the Delawares, who was not present at the meeting when the trustees contracted to sell the 5,000 acres to Young, questioned the

transaction in a letter to the Secretary of the Interior prior to the Secretary's approving the sale. The Ottawa Indians in a petition statedly representative of a majority of the tribe charged that Agent Hutchinson was handling the Ottawa lands with a view to his own enrichment. An investigation of the charges by Superintendent Albin supported Hutchinson's contention that the complaints were by a few disgruntled Indians, but this investigation did not report that Hutchinson was a member of the board of trustees, that the townsite had been conveyed to him by Young, that Hutchinson was an officer of the Town Company, or that Young was Hutchinson's father-in-law.

With the proceeds of the sale of the 5,000 acres of school lands, amounting to $6,250.00, work commenced on a school building. A basement was dug forty feet wide and sixty-five feet long. The Indian trustees, with the exception of Jones, protested the size of the building but were assured by Hutchinson and Kalloch that sufficient funds would be obtained in the east from donations to complete the building. The size of the building and the activities of Hutchinson and Kalloch from this time on make it clear that their main purpose was to build a University primarily for whites. Little or no consideration was given to the educational needs of the Indian children and from the date of the treaty until their removal to Oklahoma they received at most one year's schooling. Kalloch and Hutchinson had little success in securing financial assistance from their denominational friends in the east although large sums were expended for their traveling expenses seeking such aid.

From the beginning the white trustees, with the exception of Pratt who was at the Delaware agency and attended few meetings, dominated the actions of and controlled the board. Although the Indian trustees were a

majority on the board, they were not sufficiently advanced to cope with the business world. They were unaccustomed to the management of such an educational trust and, with the exception of Jones, not well acquainted with the English language. While the tribe had been described as "far advanced in civilization" their chief knew no English and only a few of the Indians could understand the language. Kalloch and Hutchinson remained in control of the board for a number of years. Hutchinson resigned in April 1867 following discovery of the fact he had not accounted in full for the proceeds of the sale of the Ottawa trust lands, to be discussed in more detail shortly. Kalloch resigned in February 1868.. During their tenure, however, Hutchinson sold some 3,032 acres of school lands for $22,685. According to the provisions of the treaty the proceeds of the sale of these lands should have been invested and the interest only applied to the support of the school. This was not done and was a violation of the trust. Kalloch, on the other hand, sold a reported 2,800 acres of the residue of the trust lands, which were purchased by the Board of Trustees by the 1867 treaty and which will be discussed in more detail later, and claimed the proceeds to settle his demands against the University. The board ratified Kalloch's sales and thus settled with him.

Before proceeding to the second phase of the history of the school lands with the active participation of the Baptist denomination and the completion of the University building, it may be well to digress to determine what responsibilities the Government had undertaken with respect to the school trust and what duties, if any, it had with respect to the management of the school trust. The 1862 treaty is unique in many ways. It provides to begin with that the Ottawas were to become citizens of the United States and their relations with the Government as

a tribe were to be dissolved and terminated five years from the ratification date of the treaty. The fact that the treaty provided for this eventuality no doubt accounts for the composition of the board of trustees and the provisions with respect to the management and control of the educational trust being placed solely in the hands of the trustees and their successors.

The 1862 treaty in the first paragraph of Article 6 provides for the setting apart of 20,000 acres "for the purpose of endowing a school for the benefit of said Ottawas" and also the selection of one section for school purposes. The last paragraph of said Article expressly provides for the right of the children of Ottawas and their descendants to enter the school and enjoy all privileges thereof, no matter where they may emigrate. There is no mention in the treaty of a University or a school for whites.

There is no express provision in the treaty for Governmental supervision or control of the trustees. The only function to be performed by the Government was the issuance of patents to the purchasers of school lands upon request of the trustees. It is true that John G. Pratt, one of the trustees named in the treaty, was Government agent for the Delaware Indians. If, however, his presence on the board was in an official capacity, it is not so stated in the treaty and there is no evidence he was to act as a governmental representative, or that he ever did, unless his questioning of the sale to Young may be so construed.

It is apparent, therefore, that the treaty was so framed as to leave control and management of the educational trust in the hands of the trustees with no governmental supervision or control. The relationship between the United States and the Ottawa Indians at the time of the negotiations of the treaty was similar to that of guardian and ward and a high degree of fiduciary duty rested upon

the Government. *Pottawatomie Tribe v. United States,* 3 Ind. Cl. Comm. 10, 47. There is no evidence that the officials of the Government ever first investigated to determine the capacity of the Ottawa Indians or the white trustees to manage and control an educational trust. Neither is there any evidence that there was any effort made to determine whether the Ottawa Indians were ready to take on the responsibilities of citizenship which the treaty provided they would obtain five years after ratification of the treaty. It is a fact, however, that at the time of the 1862 treaty their chiefs knew no English and only a few could speak the language. Under the circumstances there was a moral obligation on the part of the defendant to thoroughly check on their ability to face the responsibilities of citizenship and to administer a trust. There was also a duty to provide ample safeguards in the treaty for the supervision and accountability of the trustees so as to prevent mismangement. This is especially true since by the letter of 1860 containing the proposals of the Ottawas and the backers of the "University" and "company" the officials of the Government did have knowledge of the interest in the Ottawa lands displayed by the original planners of the "University" and "company."

It is for all the reasons hereinbefore stated that the Commission concludes that the United States was morally obligated in negotiating the 1862 treaty with the Ottawa Indians to see to it that ample safeguards in the way of supervision and control of the educational trust by the Government were provided in the treaty. The failure to provide these safeguards resulted in a loss to the Ottawa Indians because of the violations of the trust by the trustees. It was a violation of the trust for the trustees to sell the 5,000 acres to a member of the Board of Trustees (54 Am. Jur. Sec. 314). It was a violation of the trust for the

trustees to sell the 3,032 acres of the remaining 15,000 acres and not invest the proceeds. Proper supervision and control of the Board of Trustees for the benefit of the Indians by defendant would have prevented these violations. The Commission based upon the findings of fact herein made and the record as a whole concludes that the United States is liable to petitioner for whatever profit, based on bona-fide first sales, that was made by Hutchinson and Kalloch on the resale of the approximately 5,000 acre tract. The defendant is also liable to petitioner for the proceeds of the sale of 3,032.24 acres of school lands, amounting to at least $22,685.13, which were never invested as required by the treaty for school purposes.

In order to follow the subsequent history of the school property, it is necessary to discuss the disposition of the Ottawa Trust Lands. By Article 9 of the 1862 treaty the lands in the reserve remaining after allotments, special grants and school lands had been selected, were to be sold for the benefit of the Ottawas at not less than $1.25 per acre. These trust lands amounting to about 30,000 acres were appraised and offered for sale by Agent Hutchinson. The agent sold some 22,000 acres of the trust lands but it was discovered that he had never turned over to the Government $30,603.94 of the proceeds. Special Investigator Irwin who checked Hutchinson's accounts in 1867 forwarded deeds to property which Hutchinson had offered in admitting the shortage. Irwin was of the opinion the property offered would bring $15,000.00. The deeds were not accepted by the Government. In 1869 the Government instituted suit against Hutchinson and his sureties alleging a shortage of $41,993.71, which included the shortage of proceeds of sale; interest on the moneys collected from date of sale: funds for payroll of Government employees; funds for payment of treaty obligations; and miscellane-

ous interest. At the time of the trial Hutchinson offered a receipt (Fdg. 21) signed by the Ottawa Chief and William Hurr and James Wind (the last two being Indian members of the Board of Trustees of the University) as duly authorized and empowered delegates of the tribe. The receipt acknowledged having received through Hutchinson the sum of $41,993.77 in full of all demands against the United States or Hutchinson on account of trust, school or other monies of the tribe received by Hutchinson as special agent and unaccounted for. The receipt relates it was given because it "satisfactorily appears" that the sum was expended for the benefit of the tribe in the erection of school buildings, the improvement of their lands, and for other beneficial purposes. The United States Attorney for the District of Kansas made no objections or exceptions at the trial. Judgment was for defendants. The United States Attorney, S. A. Riggs, was suspended from office. His successor, who was directed to move for a new trial, stated, "the judgment for the defendant was really *with consent*" of Riggs. The new United States Attorney moved for a new trial which was granted and the case continued to the next term of court. The Commissioner of Indian Affairs directed Superintendent of Indian Affairs Hoag of Lawrence, Kansas, to investigate Hutchinson's administration of the trust lands. The Commissioner wrote to Hoag that the receipt had never been considered binding or valid by the Department of the Interior and had never been admitted to its files as an authenticated or official paper. Hoag reported that the Ottawa Indians, who believed Hutchinson had expended the money on the school property and who had been assured by Hutchinson that their interest in the fund was secured by their rights in the school property, wanted the Government to accept the receipt.

In 1870, the Secretary of the Interior in commenting on the Hoag report to the Commissioner of Indian Affairs stated that even if Hutchinson had made the expenditures on the school property he was unable to see how it was possible for the Department of the Interior to recognize the expenditures as forming any part of a legal settlement of Hutchinson's accounts with the Government. The Secretary was of the opinion that "the acceptance of such a paper as a valid voucher in the hands of an agent of the United States would be every way contrary, both to the laws for the settlement, and disbursement of moneys put into the hands of agents, or coming into them by authority of law, and would also be contrary to every sound rule of policy in regard to the dealings of Agents with Indian Tribes, opening the door to so great abuses as to make it impossible for the Department to accept such a mode of settlement." In December 1871, however, Hutchinson offered a compromise settlement to the Solicitor of the Treasury Department by which he agreed to pay $1,000.00 plus accrued costs. The Secretary of the Interior in view of the legal questions involved in the suit against Hutchinson left the decision in the matter up to the Treasury Department. The compromise agreement was then accepted.

The receipt given Hutchinson by the Ottawa Indians was obtained by his assurances to the tribe that the amount so receipted for would be made secure to the tribe by placing them in absolute possession and control of the school property. The naiveness of the Indians in signing the paper is readily apparent when one considers that the receipt acknowledged the expenditure of non-existent sums such as the amount claimed against Hutchinson for interest from date of collection of the land proceeds to date of statement of the account and miscellaneous interest sought from Hutchinson in the court action. Hutchinson

was accountable only to the Government and only the defendant could settle with him. The Secretary of the Interior readily saw the dangers of accepting such a paper as a valid voucher and only acquiesced in the compromise agreement later because of the doubtful legal status of the action against Hutchinson which had been caused by the mishandling of the proceedings by the United States Attorney in the earlier trial. The Government in selling the trust lands of the Ottawa Indians assumed the duty to account to the tribe for the funds collected. As trustee with respect to these funds defendant may not evade accounting therefor on the basis of a receipt given to a former agent which paper the officials of the Government refused to recognize as valid or binding. The failure of the United States to supervise and control the accountability of Hutchinson caused the loss to the Indians.

For the reasons above-stated, and based upon the findings of fact herein made and the record as a whole, the Commission concludes that petitioner is entitled to recover from the defendant the sum of $30,603.94, with accrued interest thereon at the rate of 5 percent from March 22, 1869, the date of the stating of the account until March 22, 1934, and 4 percent thereafter.

In 1866, while Kalloch and Hutchinson were still members of the Board of Trustees, Kalloch wrote to the Secretary of the Interior with an offer to have the board take over the sale of the residue of the trust lands amounting to 7,691.83 acres. Hutchinson signified his approval as agent. The Ottawa Tribe requested that the lands be sold to the University at $1.50 per acre. The Secretary of the Interior and the Commissioner of Indian Affairs recommended the sale subject to certain modifications of the terms of sale. Superintendent Murphy who was directed to look into the proposed sale informed the

Department of Interior he believed the price was fair, satisfactory to the Ottawas and the sale had the advantage of disposing of the lands in a body rather than piecemeal disposal which would take years. Kalloch in offering to take over these lands pointed out that by permitting the University to sell the lands the Indians would get all they could for the lands which was their appraised value and the University, which he said was for the benefit of the Indians, would get the profit.

The Treaty of February 23, 1867, 15 Stat. 513, II Kapp. 960, ratified on June 18, 1868, contained provisions for the sale of the residue trust lands to the trustees of Ottawa University "to be disposed of for the benefit of said institution at the appraised value thereof, * * *." While the treaty was awaiting ratification, Kalloch wrote the Secretary of Interior that the board of trustees was willing to pay the appraised value of these lands which was somewhat more than the $1.50 per acre the Ottawas had agreed to sell them for. He stated the trustees planned to give these lands as a bonus for subscriptions to backers of the University. The trustees paid $13,532.22 for these lands plus $1,014.92 interest when payment was not made in the time prescribed by the treaty. The trustees sold 7,247.70 acres of these lands through 1872 for $34,014.17 and the remaining 444 acres were appraised in December 1872 at $1,485.70.

There is no substantial evidence that the residue trust lands were sold to the trustees for less than their market value. It is true that the appraisal, on which the purchase price was figured, was made in 1864. These lands, however, were the balance after the sale of some 22,000 acres of the total trust lands. Their sale in a block was an advantageous way of disposing of them. The Ottawas themselves urged the sale and the Commissioner of Indian

Affairs had the proposed sale looked into by the Superintendent. While the trustees did make a profit on the sale of these lands it may well be that this occurred through the subscription plan proposed to be used in the sale of the lands for the benefit of the University. The evidence does not justify holding the United States failed to exercise due care in permitting this sale to the school board.

As early as 1865, the Ottawa Indians were reported as much divided with respect to the question of making a new treaty and moving south. The increased white settlement and growth of Kansas with the resulting hemming in and mixing with the Indians caused Government officials to urge new treaties with the tribes and bands in that State with the avowed purpose of removing the Indians. By the Treaty of February 23, 1867, supra, the Ottawas purchased a reservation in Indian country (now Oklahoma). The provisions of the 1862 treaty with repect to the Ottawas becoming citizens were extended for two years. The Sixth Article of the 1862 treaty providing for the educational trust was left unchanged except Article 19 of the 1867 treaty provided the school ages would be between 6 and 18 and that such children would be entitled to be received at the institution and be subsisted, clothed, educated and attended in sickness. These rights were to continue as long as any children presented themselves at the school. This article also provided that the Secretary of the Interior and the senior corresponding secretary of the American Baptist Home Mission Society were to be members ex-officio of the Board of Trustees.

In January 1868, Robert Atkinson, District Secretary of Kansas of the Baptist Home Mission Society became a member of the school board. His duties as district secretary required him to cooperate with the trustees of Ottawa University by rendering any aid to advance its interest,

usefulness and prosperity. The Society had resolved in state convention to "assure the trustees of Ottawa University that our sympathies are enlisted in its speedy completion and its highest success as a Baptist-institution." Atkinson was successful in raising funds with the support of the Society and was able to complete the college building in time to re-open the school in the spring of 1869 at which time separate white and Indian branches of the school were planned.

The terms of the 1867 treaty provided for the removal of the Ottawa Indians to Indian country. The chief of the tribe met with the school board in January 1869 seeking educational aid for them at their new home. The board offered to pay $3,000.00 a year *when it could be realized as interest on funds raised from the sale of school lands.* The following month the Ottawa Chief and Indian trustees Wind, Hurr and King, as "Delegates," signed a letter prepared by an attorney, one Blackledge, to the Commissioner of Indian Affairs requesting a treaty by which they could sell their entire Ottawa interest in the college and college lands. The white trustees with Jones, the adopted Ottawa Indian, opposed the making of such a treaty and stated the school board was ready to provide the education for the Indians. The white trustees and Jones claimed there were vested rights in the institution "which forbid any change in the present relations of the Institution, without the unanimous consent of the trustees and donors of the moneys that were expended in the creation of building and improvement of the property; * * *."

The Commissioner of Indian Affairs on September 3, 1869, instructed Superintendent Hoag to investigate the administration of the school trust. Hoag's lengthy report (Fdg. 26) in January 1870 concluded the trustees had violated their trust, the Department had been too tardy

in checking this wrong and recommended steps should be taken to restore the property to the Ottawa Indians. The Indians and their attorneys continued to press the Department of Interior in an effort to secure their rights in the school property. As a result the Secretary of Interior sent a draft of a bill to Congress which became law on June 10,1872 (17 Stat. 388). This act provided for three Commissioners to inventory and appraise all unsold lands and assets arising from the sales of land by the school trustees and the legislation authorized the Commissioners to sell the lands and assets, and distribute the proceeds to the Indians after deducting the pay and necessary expenses of the Commissioners.

The report of the Commissioners filed on December 7, 1872, in addition to containing the appraisement of the lands and assets of the school property, also discussed the equities claimed by the Baptists.

The report states in part that:

> The evidence obtained by the Commissioners shows that from the commencement the representation has been made by the white trustees (assented to by Jones) under the sixth article of the treaty of 1862, and other parties connected with them, that a white school or university would be created and perpetrated, and all along, in representing the matter to the public, the Indian school seems to have been a minor consideration. Contributions have been obtained, and emigration induced, on the ground of a white school.
>
> And it is claimed that the increase in value of property belonging to the trust, and also all other property in this locality, is due to the efforts made in behalf of a white school.
>
> The Baptists commenced their labors among the Ottawas many years ago; the majority of the trustees have been Baptists, and for the past four years the

> Baptist Home Missionary Society has exercised supervision over this trust. * * *
>
> The claim of the Baptists for the right to control this trust, and to create and maintain a white school, are set forth in the statement of Mr. Atkinson herewith, and by other parties, to the Commission, * * *
>
> It will be seen that they lay much stress on a paper signed by the Indians in 1861 [1860], agreeing to give 20,000 acres of land to Roger Williams University, which they claim was the origin of the trust, but it does not appear that this paper was signed with the knowledge or consent of the executive. * * *

This paper or agreement (Def. Ex. 183) relied on as the origin of the trust is quite similar to the December 1860 letters (Fdg. 5) to the Commissioner of Indian Affairs from the Ottawas and I. S. Kalloch, previously discussed, in which a treaty was proposed giving land to the ethereal Roger Williams University and providing requirements for the education of the Ottawa children. The commissioners also reported Atkinson, treasurer of Ottawa University, refused to turn over to them possession of the school property.

In view of the refusal of the trustees to turn over possession of the school property, the protests of the Baptists' friends of the University, and a memorandum of understanding dated November 9, 1872, entered into by an attorney for the Ottawas, the president of the school board and a representative of the Baptist Home Mission Society, the Secretary of the Interior left it up to Congress to decide what action should be taken in the matter. The Secretary in forwarding the Commission's report and other papers to Congress wrote in part as follows:

> I feel compelled to state that in my judgment the persons in charge of this property have managed it in violation of their duties as trustees in several particu-

> lars, as will be seen by a careful examination of the report of the Commissioners already referred to. Whether this mismanagement is so gross as to justify Congress in repealing the trust vested by the treaty, before referred to, is a question for that body to determine. The best information I have been able to obtain induces me to think that had the trust been legitimately managed and properly conducted the property would have been quite as valuable as it now is, without any augmentation by contributions from any outside source whatever. * * *

As to the memorandum of understanding, above mentioned, by which it was proposed the interested parties unite with the Secretary of the Interior in securing new legislation by which a commission would be authorized to determine the equitable interests of the parties, the Secretary said he did not feel at liberty to unite with these parties in seeking such legislation. The Secretary said he had no knowledge that the attorney who signed the memorandum for the Ottawas had any authority to do so.

A commission was established by the Act of March 3, 1873 (17 Stat. 623), which act generally followed the proposals of the memorandum of understanding. The act also provided that should the parties agree on a settlement then the Secretary of the Interior was authorized to carry it into effect. Such a settlement was agreed on by the parties on September 6, 1873. By this settlement the school section and 1280 acres were given to the school board; notes and mortgages held by the school board on lands sold stated to amount to at least $15,000 were to be delivered to a person designated by the attorneys for the Indians; the remaining unsold school lands (10,702 acres appraised at $50,196.97) were turned over to trustees to be sold for the benefit of the Indians; and the expenses and compensation of the Commissions set up by the 1872

and 1873 acts were to be paid equally by the school trustees and the Indians.

Under the terms of this settlement the school board received the school section appraised by the Irwin Commission (1872) at $22,600.00 and 1280 acres appraised at $7,490.00. The Ottawa Indians fared less handsomely by the terms of the agreement. The notes and mortgages estimated by the Irwin Commission to be worth at least $15,000.00 were earmarked for the attorneys for the Ottawas. With respect to the 10,702 acres appraised by the same commission at $50,196.97, the Indians eventually realized less than $13,000.00 due to mismanagement of the trust in liquidation through the sale of land at far less than their market value and the Ottawa Indians paid half the expenses of the Commission.

By this settlement, which was approved by the Secretary of the Interior on October 29, 1873, the Ottawas agreed to make no claim to the University property or any other property held or claimed by the school trustees. The Ottawas gave up their educational rights guaranteed them by the 1862 and 1867 treaties. The consideration providing for the relinquishment of the Ottawa rights under those treaties could scarcely be called fair and just to the Ottawa Indians who alone were the beneficiaries of the trust created by the 1862 treaty. The consideration passing from the other parties, whose equities are questionable, to the Ottawa Indians under the settlement agreement was in effect no more than the value of the notes and mortgages. Defendant, whose officials were required to approve the settlement, had a duty to protect the rights of the Ottawa Indians in the school property and to secure for them full compensation for the relinquishment of their beneficiary rights under the 1862 and 1867 treaties to the school property and to an education for their children. The

failure of the defendant from the beginning of the educational trust to protect the rights of the Ottawa Indians therein resulted in others eventually claiming alleged equities in the trust, loss of property rights to the Ottawa Indians by violations of the trust by the trustees handling Ottawa property, dissipation of funds to attorneys for the Ottawas which would have been unnecessary if defendant had performed its duty to the Indians, the making of a settlement agreement that was not fair or just to the Indians, and charging the Indians the expenses of commissions.

Because of the complexity of the many transactions that involved the disposition of the Ottawa Reserve in Kansas it was thought best to discuss them before setting forth the contentions of the parties. Defendant takes the position that Article VI of the 1862 treaty created a permanent charitable educational trust wholly under the control of the trustees named in the treaty and that therefore there existed no fiduciary relationship between the United States and the Ottawa Indians as to the school lands. The defendant's position fails to take into consideration the fact that at the time of the making of the 1862 treaty the relationship existing between the Indians and the Government was similar to that of guardian and ward. As previously pointed out defendant was then under a duty to see that safeguards were incorporated into the treaty to protect the rights of the Ottawa Indians and to provide supervision and control of the trust therein created. This defendant failed to do. Nor did this moral obligation end with the making of the treaty since even after that time the Indians remained in effect wards of the Government.

In its findings of fact and on oral argument, defendant intimates that the Ottawas had become citizens (Tr. 235-236) with the legal right to make settlements and en-

gage attorneys. The question of the termination of the tribal status of the Ottawas under the 1862 and 1867 treaties has been decided otherwise by the Supreme Court of the United States in *Wiggan v. Connolly*, 163 U. S. 56, 41 L. ed. 69.

Defendant contends that no liability exists as to the shortage in Agent Hutchinson's account with respect to the sale of the Ottawa trust lands since the release executed by the Ottawas to the United States fully relieves the Government from further liability. Reasons why the receipt given Hutchinson is not a bar to the claim of the Ottawas for a full accounting from defendant with respect to the trust land proceeds have been hereinbefore fully discussed and will not be reiterated.

With respect to the settlement made between the Ottawas, the school trustees, and the American Home Mission Society in 1873 defendant urges that these were made upon substantial consideration and resulted in a full release of the United States from further liability with respect to the school lands issue. As previously pointed out this Commission does not consider that the settlement, made with the approval of defendant, was based upon substantial consideration. The United States was under a duty to see that full and ample consideration passed to the Ottawas for relinquishment of their educational rights in the school and for permitting title to the school site and other lands to be vested in the University. The only consideration passing to the Ottawas for giving up these rights was the return to them of certain school lands of which they were beneficial owners and some notes and mortgages (earmarked for their attorneys) of an appraised value of $14,099.98.

Petitioner contends that in order for the Ottawa Indians to be made whole with respect to damages they may

recover, interest or some equivalent should be allowed by this Commission. As to the Government's liability to account to the Ottawa Indians for the proceeds of sale of the trust lands, this is a legal liability since the defendant assumed the duty to sell them for the benefit of the Indians. The 1862 treaty specifically provides for accruing interest on funds the United States held or may hold for the tribe. The United States paid interest on such funds as was deposited with it for the sale of trust lands. For these reasons accrued interest is allowed on the sum of $30,603.94 at 5 percent interest from date of the stating of the account, March 22, 1869, until March 22, 1934, and 4 percent thereafter. See sec. 2516(a) of Title 28, U. S. Code, revised; *The Miami Tribe of Oklahoma v. United States*, 6 Ind. Cl. Comm. 513. Interest is not allowed on the other sums petitioner is herein found entitled to recover since the duty owed petitioner in respect to those transactions is based on a moral obligation to protect the Indians and their property and recovery is allowed under clause (5) of Section 2 of the Indian Claims Commission Act. *Osage Tribe v. United States*, 119 C. Cls. 592, 672; *Loyal Creek Indians v. United States*, 118 C. Cls. 373, 383.

This case was submitted by the parties on the limited issue of petitioners' right to recover. The findings of this Commission with respect to some of the transactions complained of reveal that the amount of recovery is ascertainable from the record. Petitioners, therefore, are entitled to recover from defendant:

| | | |
|---|---|---|
| 1. | Trust Land Funds unaccounted for by Agent Hutchinson (with accrued interest thereon at rate of 5 percent from March 22, 1869, to March 22, 1934 and 4 percent thereafter) | $30,603.94 |
| 2. | Appraised value of School Section | 22,600.00 |
| 3. | Appraised value of 1280 acres conveyed to University | 7,490.00 |
| 4. | Treaty Funds | 3,354.75 |
| 5. | Expenses of 1872 and 1873 Commission paid by Ottawas | 1,202.42 |

In addition petitioners are entitled to recover from defendant (a) the appraised value of the 10,702 acres of school lands, amounting to $50,196.97, turned over to trustees by the 1873 agreement for sale for the benefit of the Ottawas, less whatever sums are shown to have been actually paid to the Indians by the trustees from the proceeds of sale and less the amounts expended for expenses and services of trustees set forth in Finding 44; (b) an amount equal to the profit that may be shown was made by Hutchinson and Kalloch from the sale of 5,000 acres of school lands which may be shown by the records of bona-fide first sales of these lands; and (c) the value of the 3,032 acres of school lands sold by the trustees who did not invest the proceeds as required by the 1862 Treaty—the amount to be determined by taking the average sales prices of record for these sales. Accordingly, an interlocutory order will be entered.

WM. M. HOLT,
*Associate Commissioner.*

I concur:

EDGAR E. WITT,
*Chief Commissioner.*

Commissioner Watkins took no part in the consideration and decision of this case.

## OPINION OF THE INDIAN CLAIMS COMMISSION ON DEFENDANT'S MOTION FOR REHEARING.

(Decided March 10, 1961.)

HOLT, Associate Commissioner, delivered the opinion of the Commission.

This case is before us on the defendant's motion for rehearing filed on October 14, 1960.

Petitioners' claims involve the two treaties of June 24, 1862 (12 Stat. 1237) and February 23, 1867 (15 Stat. 513) made with the Ottawa Indians whereby some 20,640 acres of their Kansas Reservation lands were set apart to endow a school for their benefit, and for the sale of the remainder of their unallotted reservation lands.

The Commission, after intensive and thorough consideration of a voluminous record, made findings of fact and rendered its opinion on June 29, 1960 (8 Ind. Cl. Comm. 831) holding that petitioners were entitled to recover the following sums: $30,609.94 shortage in Trust Land Sales; $22,600 as the appraised value of the Ottawa School Section; $7,490 as the appraised value of 1,280 acres of Ottawa lands conveyed to the Ottawa University; $3,354.75 unpaid treaty funds received by the Indian Agent; $1,202.42 expenses of the 1872 and 1873 Commission paid by the Ottawas; and, in addition, to recover the appraised value of 10,702 acres of school lands less any payments made; an amount equal to the profit that was made from the sale of 5,000 acres of Ottawa school land, and for the value of 3,032 acres of school land sold by the trustees.

The defendant states three grounds for its motion, to-wit:

1. That the case submitted to the Commission was limited to the issues related to the right to recover while

the Commission concluded as a matter of law that petitioners were entitled to recover certain sums.

2. That the ultimate findings and the interlocutory order based thereon are not supported by a preponderance of the evidence and the Commission's conclusions of law are not supported by its findings of fact.

3. That since the date of the Commission's decision the defendant through additional investigation and research has located newly discovered evidence which supports its contentions.

The defendant also urges in its memorandum in support of the motion that the claim was pleaded as a legal or equitable claim under Section 2, Clause 1 of the Indian Claims Commission Act and that the Commission recognized the claim sued on in the first cause of action as a legal claim.

In the petition the first 31 paragraphs set forth the transactions involving the lands of the Ottawas in the first cause of action and allege in paragraph 31 that petitioner is entitled in equity to the value of the lands acquired in trust for the purposes of the University and to a full and complete accounting with respect to University and trust lands and funds derived from the sale thereof. Upon the same facts set forth in the paragraphs constituting the first cause of action petitioners in their second cause of action seek relief under the "fair and honorable dealings" provision (Clause 5) of the Act, and in the third cause of action allege duress and pray for a revision of the Treaty of June 24, 1862, to impose an obligation on the United States to supervise and enforce the provisions of the school trust in the event the treaty was construed not to have expressly or impliedly imposed such a duty on the United States.

Defendant's counsel urges that the petitioner's claim "having been thus recognized as a legal claim cannot again be considered as a moral claim under Clause 5 of Section 2 of the Act." [1] If the Commission had recognized or construed the pleadings as setting forth only a legal claim there might be merit to the contention made by defendant. The difficulty in following the argument hinges on the view of defendant that the pleadings present but one claim when in reality there are a number of claims asserted in the petition. The Ottawa Indians seek among other things recovery for the shortage of the proceeds of their trust lands sold by their Indian agent under authority of the provisions of the 1862 treaty. With respect to these funds the Commission concluded there was a legal liability on the part of the Government to account to the Ottawas.[2] As to the claim of the Ottawa Indians regarding the transactions involving the school lands the Commission did not hold the allegations with respect thereto set forth a legal claim. We did not construe the provisions of the treaties as imposing upon defendant trust obligations with respect to the school lands.[3] We did decide however, that, based upon the facts and circumstances of record, the United States was under a moral obligation in view of the then dependent status of the Ottawas to provide sufficient

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[1] Def. Memo., page 11. And see also pp. 82-86.

[2] Opn. 8 Ind. Cl. Comm. 831, 898. "As to the Government's liability to account to the Ottawa Indians for the proceeds of sale of the trust lands, this is a legal liability since the defendant assumed the duty to sell them for the benefit of the Indians."

[3] Opn. 8 Ind. Cl. Comm. 831, 883—"The relationship between the United States and the Ottawa Indians at the time of the negotiations of the treaty was similar to that of guardian and ward and a high degree of fiduciary duty rested upon the Government." While such a relationship does not impose trust obligations it has been held to create moral obligations. The Commission therefore did not view the relationship as creating a legal liability.

supervision and control of the educational trust by officials of the Government to safeguard the rights of the Indians.[4] The Commission clearly set forth its view that the facts supported a right of recovery as to the school lands under Clause (5) Section 2 of the Indian Claims Commission Act and the petitioners had alleged a claim bottomed on fair and honorable dealings in their second cause of action (paragraphs 32 through 34, pp. 11-12 of the petition).[5]

It would appear from the above portion of defendant's brief and the comments made therein on pages 82-87, that counsel for defendant misconstrues the conclusion drawn regarding the school trust. We did not hold there was a fiduciary duty on the part of the United States based on legal principles but rather one based on a moral obligation.

*Limited Issues Submitted.*

Defendant's motion for rehearing is based in part on the grounds that although the case was submitted on the limited issue of petitioners' right to recover the Commission determined as a matter of law that the petitioners were entitled to recover certain sums. With respect to certain of these items such as the $30,603.94 shortage in the Trust Land Sales, the $3,354.75 treaty funds not turned over to the Ottawas, and the expenses of the 1872 and

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[4] Opn. 8 Ind. Cl. Comm. 831, 884—"It is for all these reasons hereinbefore stated that the Commission concludes that the United States was morally obligated in negotiating the 1862 treaty * * * to see to it that ample safeguards in the way of supervision and control of the educational trust by the Government were provided in the treaty. The failure to provide these safeguards resulted in a loss to the Ottawa Indians because of the violations of the trust by the trustee."

[5] The same reasoning applies to defendant's legal argument in its Memorandum (pp. 5-6) accompanying its motion to rehear that "The petition fails to state a cause of action."

1873 Commissions amounting to $1,202.42, these are sums certain which further proof would not change in any respect.

The Commission further held that the United States was liable for the appraised value of the Ottawa school section in the amount of $22,600.00 and the appraised value of 1,280 acres of Ottawa lands conveyed to Ottawa University in the settlement in the sum of $7,490.00. Counsel for defendant argues that this determination deprives the Government of "an opportunity of offering evidence as to value of such land at whatever would be the proper valuation date." The school section (640 acres without improvements) had been appraised by a United States Commission in 1872 at $22,600.00. What better evidence of the value of said section could be adduced by the Government in the light of such an appraisal made at or near the time that the Ottawa Indians were giving up their interests in the land by a settlement with Ottawa University? The 1,280 acres were appraised by the same Commission as were the 10,702 acres valued at $50,196.97 turned over to the trustees named in the settlement agreement of 1873.

*Contention that Findings of Fact are Contrary to a Preponderance of the Evidence.*

This discussion by defendant's counsel is but a review of the evidence in the record, buttressed by what defendant contends is "newly discovered evidence." It is significant that few of the evidentiary findings of fact made by the Commission are questioned either directly or indirectly. One of the few to which attention is invited is Finding of Fact No. 4 which reads in part as follows:

> 4. Although the Ottawas were reported to be "far advanced in civilization," their chiefs knew no English, and only a few of the Indians could under-

> stand the language. The great majority were not sufficiently advanced to cope with the white man's civilization (Pet. Ex. 31). * * *

The language in this part of the finding of fact made by this Commission is taken verbatim from Petitioner's Requested Finding of Fact 6 (page 8 of Pet. Prop. Fdgs.) and to which requested finding the defendant interposed no objection (page 107 of Def. Brief).

Defendant now takes the position that evidence not submitted by the parties during the course of the trial would show that the Ottawa Indians were sufficiently advanced in civilization to handle an educational trust. The new evidence pertaining to the moral, spiritual, and educational advances in civilization is cumulative and therefore not of sufficient weight to change this finding of the Commission.[6] It is apparent that defendant's use of the new evidence is to show "the Ottawa Indians were probably further advanced in civilization at the date of the execution of the 1862 treaty than any of the Indian tribes that were located in the Kansas Territory."[7] Assuming this were so, it would be a matter of degree and would not in itself be sufficient to cause an alteration of our finding of fact number 4.

Defendant also questions the Commission's Finding of Fact 5 in which we found in part:

> So far as appears, "Roger Williams University" was an institution on paper only, with no tangible assets, and with expectations arising only from the possibility of obtaining lands from the Ottawas, and from the hope, with the lands as a start, of subsequently obtaining money contributions (Def. Ex. 132).

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[6] Defendant's Memorandum pp. 14-41—The defendant's "newly discovered evidence" consists of exhibits 229-315 or 87 in number.

[7] Def. Memo. pp. 39-40.

This finding of fact was requested by the petitioners in their proposed finding of fact number 7 (page 10 of Pet. Prop. Fdgs.) and during the original briefing of the case defendant interposed no objection to the requested finding (see page 107 of Def. Brief).

While the defendant again at page 65 of its Memorandum asserts "There is no substantial evidence to support the Commission's findings Nos. 1-45 inclusive herein" there is no attempt to further specifically challenge the evidentiary findings made by the Commission except for Finding of Fact 39 and the discussion by defendant with respect to that finding is but argument.

*New Evidence.*

One of the grounds for defendant's motion for rehearing is based upon so-called newly discovered evidence collected since our determination in this case which defendant believes clarifies and supports the Government's findings in this case. Defendant's new proposed exhibits are identified by number as exhibits 229 through 315—or a total of 87 exhibits. None of the proposed exhibits meet the requirements of Section 33(b)3 of the General Rules of Procedure of the Indian Claims Commission Act. We believe the new evidence is cumulative.[8] Defendant's counsel explains the "newly discovered evidence" as follows:[9]

> During oral argument when the case was submitted counsel for the defendant pointed out to the Commission that he was the fourth attorney that had been assigned to represent the United States in this case and was under the handicap of trying, in a short time, to familiarize himself with a very voluminous

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[8] Cf.—*Caddo Tribe v. U. S.*, 8 Ind. Cl. Comm. 354, 378-380.

[9] Def. Memo., p. 12.

> record of exhibits which had been assembled and presented by the previous government attorneys assigned to the case. * * * Furthermore, defendant through additional investigation and research has located newly discovered evidence which clarifies and affirms its findings heretofore submitted to the Commission. * * *

There is no showing that diligent research could not have discovered this evidence.

We have, however, considered defendant's proposed exhibits and it is not believed necessary to relate what each exhibit shows since we find them to be cumulative. Many are offered to support defendant's contention that the Ottawa Indians were sufficiently advanced in civilization to manage and control a trust. Much of this evidence offered in this respect is general or comparative in nature as to other tribes. Over half of the offered exhibits are contemporary newspaper clippings pertaining to a variety of things such as the growth of the town of Ottawa, the sale of Ottawa lands, delinquent tax lists, and stories on the history of Ottawa University. The weight given to such evidence as newspaper articles is always questionable and the materiality of much of this evidence is doubtful. However, the defendant's proposed Exhibits numbered 229 to 315, inclusive, will be admitted in evidence and made a part of the record in this case.

Therefore, except for the admission in evidence of the exhibits, as set forth above, defendant's motion for rehearing will be denied for the reasons hereinbefore stated.

WM. M. HOLT,
*Associate Commissioner.*

I concur:

T. HAROLD SCOTT,
*Associate Commissioner.*

**OPINION OF THE INDIAN CLAIMS COMMISSION.**

(Decided: November 26, 1962.)

HOLT, Associate Commissioner, delivered the opinion of the Commission.

In a prior determination in this case (8 Ind. Cl. Comm. 831) this Commission made findings of fact and rendered an opinion in which it held that petitioners herein were entitled to recover of defendant certain stated sums and that as to certain other issues the petitioners were entitled to recovery of and from the defendant but that the amounts could not be definitely determined without further hearings and proof thereon. The Commission by Interlocutory Order of June 29, 1960, held that defendant was liable for, and the parties were ordered to submit additional proof thereon, as to the following:

> 2. * * *
>
> (a) The appraised value of the 10,702 acres of school lands, amounting to $50,196.97, turned over to trustees by the 1873 agreement for sale for benefit of the Ottawas, less whatever sums are shown to have been actually paid to the Ottawas by the trustees from the proceeds of sale and less the amounts expended for expenses and services set forth in Finding of Fact No. 44, and
>
> (b) For an amount equal to the profit that may be shown was made by Hutchinson and Kalloch from the sale of 5,000 acres of Ottawa school land which may be shown by records of bona-fide first sales of these lands, and
>
> (c) For the value of 3,032 acres of Ottawa school lands sold by the trustees who did not invest the proceeds as required by the Treaty of June 24, 1862—the amount to be determined by taking the average sales prices of record for these sales.

In addition to a determination of the above questions the Commission has now before it the issue of what offsets, if

any, defendant is entitled to under the provisions of the Indian Claims Commission Act.

Following the entry of the Commission's Interlocutory Order of June 29, 1960, the defendant filed a motion for rehearing on October 14, 1960, which motion was objected to by the petitioners and orally argued before the Commission by the parties. On March 10, 1961, this Commission rendered an opinion (9 Ind. Cl. Comm. 98) denying defendant's motion for a rehearing. The previous findings of fact and opinions made in this case fully set forth the pertinent facts involved in these claims and need not be reiterated now. After denial of defendant's motion for rehearing hearings were held on the remaining issues and defendant introduced additional evidence on the matters for determination and on offsets while petitioners rested its case on the evidence already before the Commission.

Defendant's proposed findings of fact and brief (filed on August 3, 1962) contain an exhaustive examination of the entire record on not only the limited issues as to amounts of recovery set forth in the Commission's Interlocutory Order of June 29, 1960, to be given further consideration but also a reargument of the entire case. This was done in spite of the fact that defendant's motion for rehearing was, after careful consideration thereof by the Commission, denied on March 10, 1961 (9 Ind. Cl. Comm. 98). The Commission in view of its previous findings of fact and opinions in this case intends herein to confine itself to the limited questions set forth in its Interlocutory Order of June 29, 1960, and to a determination of offsets.

*Trust in Liquidation Under 1873 Settlement.*

Petitioners contend that the only payment made by the trustees charged with the sale of 10,702 acres of school lands under the 1873 settlement (Findings of Fact 32 and 33, 8 Ind. Cl. Comm. 831, 860-861) was the sum of $4,-

934.27 paid in 1881. Petitioners also contend that although a further amount of $7,280.88 was found due in 1883 from the trustees by the judge examining the accounts of the trustees named after the settlement agreement, no order for payment of such fund was entered and that there is no evidence that the Ottawa Indians ever were paid this additional amount. Defendant urges that the $7,280.88 plus the $4,934.27, or a total of $12,215.25, should be found to have been paid the Ottawa Indians. The burden of proof is upon defendant to show payment of the $7,280.88 to the Ottawas. The record does not show such payment and this sum may not be so deducted. Petitioners are entitled to recover the amount of $50,196.97, less the amount of $4,934.27 paid to the Ottawa Indians, and less the sum of $1,571.45 expended for expenses and services of the trustees as found in Finding of Fact No. 44, leaving a balance due petitioners of $43,691.25.

*Profit Made by Hutchinson and Kalloch from Sale of 5,000 Acres of School Land.*

The 5,000 acres include the town site of Ottawa, Kansas, of 640 acres sold by the trustees of the Ottawa school lands to one of their own members, Young, for $800.00, who in turn conveyed the land to Hutchinson, also a trustee and his son-in-law, for $800.00. Hutchinson later sold this site to the Ottawa Town Company for $10,000.00. (Finding of Fact No. 11.) Petitioners seek to recover the sum of $223,728.10 which they contend the promoters of the Ottawa Town Company received as profit in the sale of town lots. Defendant on the other hand urges that the United States is liable, if at all, only for the profit made by Hutchinson by his sale to the Ottawa Town Company. Defendant asserts that the evidence shows that the sale on September 15, 1864, from Hutchinson to the Company,

was a bona fide sale made for the consideration of $10,000.00, as shown by the warranty deed and the minutes of the Ottawa Town Company, and that the profit to Hutchinson being $9,200.00, this is the sum which petitioners are entitled to recover for 640 acres of school land under paragraph 2(c) of the Commission's Interlocutory Order of June 29, 1960. Petitioners have offered no proof to show that the sale of the town site to the Ottawa Town Company by Hutchinson was anything but a bona fide transaction. It is true that Hutchinson was an officer of the town company but this fact falls far short of imputing any cloud upon the transaction. The consideration paid Hutchinson by the town company, without proof to the contrary, may well have been the fair market value of the 640 acre unimproved town site at the time of purchase. The only profit that may be accurately figured from the record to have been made by Hutchinson in this transaction is $9,200.00.

The remaining acreage of the "5,000 acre school tract" consisted of 4,348.79 acres. This was part of the 5,000 acres purchased by Young which he assigned to I. S. Kalloch to whom a patent was issued in February 1865. On June 17, 1865, Kalloch sold Richard D. Lathrop an undivided one-half interest in the lands for the sum of $4,000.00, which deed was recorded June 17, 1865. Between 1865 and 1871, 4,093.60 acres of the 4,348.79 acres were resold by the following parties to the public for the sum of $43,537.03 as follows:

1. Kalloch and wife sold 2,818.12 acres for $18,292.84
2. Lathrop sold 982.81 acres for $18,106.56
3. Kalloch and Lathrop sold 130.12 acres for $2,550
4. Hutchinson sold 162.55 acres for $4,587.63

Petitioners contend that certain of these sales were not arm's length sales. One is a sale by Kalloch to United States Senator Pomeroy in April 1865 of 380 acres at $1.25 per acre of which he resold 320 acres in June 1868 for $3,000.00 and the remaining 60 acres were resold in 1869 for $1,500.00. Another questioned transaction involves 400 acres sold by Kalloch to United States Senator Lane at $1.25 an acre in April 1865 which the latter resold in May 1866, together with 90 lots in the town of Ottawa, for $2,000.00. Also questioned as a bona fide sale was the conveyance of 240 acres together with 6 lots for $100.00 by R. D. Lathrop to H. F. Sheldon on July 29, 1868. Sheldon on the same day resold the land for $1,600.00. Petitioners contend that "These second sales by associates of Kalloch and Hutchinson thus returned $7,025.00 in addition to the recited consideration of $43,537.03 on first sales, or a total of $50,562.03 received by Kalloch, Hutchinson and/or associates for the sale of 4,093.60 acres." To the total sum of $50,562.03 the petitioners would add $3,151.59, which is obtained by multiplying 255.19 acres for which there was no consideration recited in the conveyances by the average price received per acre (stated to be $12.35) for the sale of the balance of the lands as described above.

Defendant urges that petitioners are entitled to recover, if at all, only the sum of $29,731.27 as the profit made by Kalloch. This amount is arrived at by adding together the following: $18,292.84 for 2,818.12 acres of land sold by Kalloch and his wife; $1,275, which is one-half of the $2,550 received by Kalloch and Lathrop for the sale of 130.12 acres; $1,575.80, Kalloch's half obtained by giving an average value of $12.35 per acre to the 255.19 acres for which no consideration is of record; and $4,587.63 for 162.55 acres sold by C. C. Hutchinson. Unless, however, the sale of an undivided half interest to Lathrop was not

bona fide, we do not see how the defendant can be charged with a sum that high. Petitioners would have the United States held liable for all the receipts received for the sale of the 4,348.79 acres because Kalloch and Hutchinson were associated with Lathrop in the Ottawa Town Company and therefore the sale of the undivided half interest, according to petitioners, was not bona fide. This contention defendant urges is an attempt to apply "guilt by association" by inference. There is nothing in the record to show that the sale of an undivided half interest by Kalloch to Lathrop was not bona fide. To reason otherwise because of the association of the men in the town company would be arbitrary and speculative. Petitioners are entitled to consider as Kalloch's profit the sum of $27,-344.31, less the original payment. This sum is arrived at by taking into consideration the $4,000.00 paid Kalloch by Lathrop; $21,768.51, being half of the $43,537.03 obtained for the sale of 4,093.60 acres; and $1,575.80, which is half of the $3,151.59 applied to the 255.19 acres unaccounted for. From the $27,344.31 which would represent Kalloch's share of the sales must also be deducted the amount of $1.25 per acre originally paid by Young for these lands, or $5,450.00, leaving a net profit of $21,894.31.

Petitioners would add to their recovery by taking, as previously stated, the second sales prices in the transactions with Senators Pomeroy and Lane, and H. F. Sheldon on the grounds that the original sales t these persons were not bona fide. As to the sales to the Senators it is to be noted that the second sales occurred a considerable length of time after the original conveyances in 1865 by Kalloch. In the case of Senator Pomeroy 320 acres were resold in 1868 and 60 acres in 1869 while the lands transferred to Senator Lane were resold over a year later in 1866 and this resale included 90 lots in the town of Ottawa, the value

of the lots not being shown by the record. Even if the tracts purchased by the Senators had not been improved at time of resale, and they may well have been, the time interval with changing conditions such as economic development of the area could readily account for the increase in market value. There is no substantial evidence of record that the Senators were given a bargain price for lands worth many times the amount paid in 1865 and there is no evidence of record that the Senators were associates of Kalloch or Hutchinson in selling these lands. As to the sale by Lathrop to Sheldon of 240 acres on July 29, 1868, together with 6 lots for $100.00 which lands and lots were sold on the same date by Sheldon for $1,600.00, the record does not separately state the value of the lands and the lots. It would be arbitrary and speculative to attempt now to place a separate value on each.

With respect to the 4,348.79 acre portion of the "5,000 acre school tract" petitioners are entitled to recover from defendant the sum of $21,894.31 which is the profit made by Kalloch, as shown by the record, in the same of these lands. The total recovery for the 5,000 acre tract is therefore $21;894.31 and $9,200.00, or $31,094.31.

*Sale of 3,032 Acres of Ottawa School Lands by Trustees*

This issue involves the value of 3,032 acres of Ottawa school lands sold by the school trustees who did not invest the proceeds realized from the sale of these lands as required by the Treaty of June 24, 1862. Paragraph 2(c) of the Commission's Interlocutory Order of June 29, 1960, permitted the recovery to be determined by taking the average sales price of record for these sales. The parties agree as to the facts of record with respect to the value to be given these 3,032 acres as shown by the sales and that the petitioners are entitled to recover, if at all, the amount

of $24,396.17 (Def. Req. Fdg. Alternate 37 and Pet. Req. Fdg. 53). Defendant, in addition to objecting to any recovery on this item on the same grounds as previously urged to this Commission in prior hearings, also contends that there is nothing in the Irwin Report (Def. Ex. 149) which shows that Agent Hutchinson sold these 3,032.24 acres of land. These lands were sold by the school trustees and the proceeds were not invested as required by treaty so it is immaterial whether Hutchinson or some other trustee actually conveyed the property. Petitioners are entitled to recover $24,396.17.

*Offsets.*

Defendant in its amended answer alleged offsets in the amount of $146,005.80. At a hearing on the question of offsets on November 8, 1961, defendant reduced the amount of claimed offsets to $15,996.26. In support of its claimed offsets defendant filed two reports of the General Accounting Office (Def. Ex. 316 and 317), offered the testimony of Mr. Francis J. Gillies of that office who supervised their preparation and submitted as evidence photostatic copies of representative vouchers to show disbursements under the various categories of alleged offsets. Defendant seeks three classifications of offsets; (1) the value of 1,747 acres of land in the amount of $11,372.97 which defendant urges petitioners received in excess of the amount of land promised them under Articles III and XI of the Treaty of July 30, 1831, 7 Stat. 359, II Kapp. 335; (2) expenditures totaling $2,014.55 disbursed solely for the benefit of Ottawa Indians of the Blanchard's Fork and Roche de Boeuf bands during the period 1862 to 1947; and (3) expenditures made jointly for the benefit of these bands and other Indians of the Quapaw Agency from July 1, 1870 to August 31, 1947, for which defendant seeks

petitioners' proportionate share of offsets based upon population figures in the amount of $2,608.74.

Petitioner takes the position that none of the alleged offsets are allowable because, in petitioners' view, the defendant has failed to demonstrate that the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action. The Commission, however, in taking into consideration these standards set forth in the Indian Claims Commission Act, 60 Stat. 1049, finds nothing in the record to justify denying defendant allowable offsets in this case.

Petitioners also object to specific items claimed by defendant as allowable offsets on the grounds that such items were individual benefits rather than tribal benefits; were purchased with money expended under appropriations which provided funds for purposes excepted by the provisions of the Indian Claims Commission Act such as for health or education; or were expenditures made prior to the 1862 treaty. The Commission has considered each item claimed by defendant in the various categories urged and either allowed or disallowed in the findings of fact this day entered herein. It would serve no useful purpose in this opinion to paraphrase the findings of fact. In considering the claimed offsets the Commission has studied the nature of each item, the quantity involved, the population of the petitioner bands and in general has followed the guide lines set forth by this Commission in *Red Lake, et al., v. United States,* 9 Ind. Cl. Comm. 457.

In the three classifications of claimed offsets the Commission has found (Findings of Fact 52 through 55) defendant to be entitled to set off some of the items in two of the categories but has denied as proper the alleged offset of $11,372.97 as the value of 1,747 acres of land since the transaction occurred prior to the 1862 treaty. Of the alleged offsets for expenditures for the benefit of Ottawas

alone the Commission allows a total sum of $1,055.50 as proper offsets (Finding of Fact 53). As to joint disbursements for the benefit of Ottawas and other Indians of the Quapaw Agency the Commission allows $973.27 (Finding of Fact 54). The total amount of offsets defendant is allowed therefore totals $2,028.77.

Offsets which were claimed but were expenditures, such as the purchase of seed, from the Osage Civilization Fund, are not allowable since these were not disbursements from the public fund. Many items disbursed under the appropriation "Contingencies, Indian Department" have not been allowed since they could have been for administrative or agency use. Some items such as "Travel Expenses of Indigent Indians" are denied as offsets since they are plainly an individual rather than tribal benefit.

Petitioners are entitled to recover the various sums set forth in Finding of Fact No. 50, less offsets in the amount of $2,028.77.

WM. M. HOLT,
*Associate Commissioner.*

I concur:

T. HAROLD SCOTT,
*Associate Commissioner.*

Chief Commisisoner Watkins took no part in the decision of this case.

**FINAL AWARD OF THE INDIAN CLAIMS COMMISSION.**

(Dated November 26, 1962.)

Upon the Findings of Fact Nos. 1 through 45 and the Interlocutory Order entered herein on June 29, 1960, and the Additional Findings of Fact Nos. 46 through 57 this day entered herein, all of which are hereby made a part

hereof, the Commission concludes as a matter of law that the petitioners are entitled to recover from the defendant the following sums, to-wit:

| | |
|---|---|
| (1) For Trust Land Funds unaccounted for by Agent Hutchinson, the sum of ---------- together with the interest thereon at 5% per annum from March 22, 1869 to March 22, 1934, and 4% per annum thereafter. | $30,603.94 |
| (2) For the appraised value of the Ottawa School Section of land, the sum of ---------- | 22,600.00 |
| (3) For the appraised value of 1,280 acres of Ottawa lands conveyed to Ottawa University -- | 7,490.00 |
| (4) For Treaty Funds received by Agent Hutchinson for delivery to the Ottawa Tribe and not accounted for, the sum of ---------- | 3,354.75 |
| (5) For expenses of the 1872 and 1873 commission paid by the Ottawas, the sum of ------ | 1,202.42 |
| (6) For the value of School Lands in Trust in Liquidation, the sum of ---------- | 43,691.25 |
| (7) For Agent Hutchinson's profit on sale of Townsite, the sum of ---------- | 9,200.00 |
| (8) For the profit by Kalloch and Hutchinson on sale of 4,348.79 acres of School Land Tract, the sum of ---------- | 21,894.31 |
| (9) For Consideration from sale of 3,032.24 acres of school lands by Hutchinson, the sum of -- | 24,396.17 |

or a total sum of $164,432.84, plus the interest on the $30,603.94, less the sum of $2,028.77 representing allowable gratuitous offsets.

It is therefore Ordered, Adjudged and Decreed by the Commission that the petitioners herein, for and on behalf of and for the benefit of the members and descendants of members of the bands of Ottawa Indians which entered into the treaties of June 24, 1862 (12 Stat. 1237) and February 23, 1867 (15 Stat. 517), do have and recover of and from the defendant the sum of $162,404.07, together with interest on $30,603.94 at 5 per cent per annum from March 22, 1869 to March 22, 1934, and 4 per cent per annum thereafter.

Dated at Washington, D. C., this 26th day of November, 1962.

WM. M. HOLT,
*Associate Commissioner.*

T. HAROLD SCOTT,
*Associate Commissioner.*

Chief Commissioner Watkins took no part in the decision of this case.

## OPINION AND JUDGMENT OF THE UNITED STATES COURT OF CLAIMS.

(Decided June 12, 1964.)

JONES, *Chief Judge*, delivered the opinion of the court:

This is an appeal by the Ottawa Tribe from the final award of the Indian Claims Commission (hereinafter referred to as the Commission) entered November 26, 1962. 11 Ind. Cl. Comm. 577a (Docket No. 303.)[1] Appellant claims that certain items of the damages awarded by the Commission are insufficient, and that additional elements of damages, to be measured by the appropriate rates of interest, should be allowed. Although appellee also filed a notice of appeal, that cross-appeal must be considered abandoned since appellee now urges us to affirm the decision below.

By the Treaty of August 30, 1831, 7 Stat. 359, the United States conveyed to the Ottawas a 75,000-acre reservation in what is now Franklin County, Kansas. During

[1] The findings of fact by the Commission are reported in 8 Ind. Cl. Comm. 831-873 (1960) and in 11 Ind. Cl. Comm. 550-565 (1962). The opinions of the Commission may be found in 8 Ind. Cl. Comm. 874-899 (1960) and in 11 Ind. Cl. Comm. 566-577 (1962).

the 1850's, the United States negotiated with the Indian tribes west of the States of Missouri and Iowa to obtain Indian lands for the settlement of citizens thereon. By a Treaty of June 24, 1862, 12 Stat. 1237, the Ottawas agreed to dispose of their reservation by special grants and allotments to all members of the tribe but to reserve 20,640 acres to endow permanently a school for the Ottawas (the so-called "school lands") and 30,000 acres which were to be sold by the Indian Agent in trust for the Ottawas (the so-called "trust lands"). The school lands and the trust lands are the subject of the present controversy.

Under the 1862 treaty the 20,640 acres of school lands were to be disposed of by reserving 640 acres for the school-site, by selling 5,000 acres to provide funds for the construction of the school, and by selling the remaining 15,000 acres to provide an endowment for the school. The treaty provided for a board of seven trustees to manage the school. This board was to be composed of four Indians and three white citizens. The trustees were empowered to fill vacancies in the board, but the presence of two white trustees was required for the transaction of business by the trustees. Four Indians and John Pratt, a white citizen, were named in the treaty as trustees. The Indian trustees thereafter elected the United States Indian Agent for the Ottawas, C. C. Hutchinson, and Hutchinson's father-in-law, John Young, as the two additional trustees. Young was soon replaced as a trustee by one Kalloch.

Before Young was replaced by Kalloch, the school board contracted to sell to Young the 5,000 acres of school lands for $1.25 per acre. Young subsequently conveyed 640 acres, which later became the townsite, to Hutchinson for $800 and assigned the remaining 4,350 acres to Kalloch.

Kalloch and Hutchinson were president and vice-president, respectively, of both a "Roger Williams Uni-

versity" and the Ottawa Town Company (hereinafter referred to as the Company). The Commission has found that the "Roger Williams University" was an institution on paper only, with no tangible assets, and with few prospects unless lands were obtained from the Ottawas. The name of this "Roger Williams University" was soon changed to Ottawa University which became the school endowed by the provisions of the 1862 treaty. It can also be gathered, from the record, that the primary objective of the Company, in its transactions connected with the present case, was the real estate speculation with Ottawa lands.[2]

According to the deed records, Hutchinson conveyed the 640-acre townsite to the Company for a stated consideration of $10,000. The Company then divided the townsite into lots which were sold at varying prices, conveyed for other consideration or given away to aid development. Appellant alleges that the townsite was divided into about 4,100 town lots of which 40 lots were sold to pay taxes on the property; 500 lots were given to Franklin County for $2,680 for developmental purposes; 147 lots were transferred for $3,000 to Commissioner of Indian Affairs, William P. Dole, who negotiated the 1862 treaty with the Ottawas; 2,235 lots were transferred to shareholders of the Company at a total recited consideration of $36,675; and the remaining 1,178 lots sold to bona fide purchasers. The parties have stipulated that the total consideration received by the Company for the 4,100 lots was $116,172.68.

In 1865, Kalloch sold to Richard D. Lathrop, a member of the Company, an undivided one-half interest in the 4,350 acres, which Kalloch obtained as assignee of Young, for the sum of $4,000. Between 1865 and 1871, over 4,000 acres of this land were sold to the public for $43,537.03.

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[2] 8 Ind. Cl. Comm. 879-880 (1960).

The remainder of the 4,350 acres, which were unsold as of 1871, had a value of $3,151.59.

Of the so-called school lands, there remained the 15,000 acres which were intended to be an endowment for the school. The Commission found that these 15,000 acres were dissipated through various means and that the Indians only received $4,934.25 from the proceeds of sale of this tract of land.

As to the so-called trust lands, it was found that Hutchinson had not turned over to the Government $30,603.94, which sum he had received from the sale of some 22,000 acres of trust lands. The remainder of these trust lands was conveyed to the Ottawa University, under the provisions of a Treaty of February 23, 1867, 15 Stat. 513, 517, at the 1864 appraised value of $13,532.22. By 1872, the University had realized over $35,000 from the resale of the land so obtained.

Appellant's petition before the Indian Claims Commission, filed pursuant to the Indian Claims Commission Act § 2, 25 U. S. C. § 70a, prayed for judgment for the net proceeds obtained by the school trustees from the sales of lands conveyed to such trustees and for the value of the part of such lands never sold by these trustees, and for such other and further relief as the Commission might deem just.

The Indian Claims Commission found that the Ottawas were not sufficiently advanced to cope with the business world, and that there was a moral obligation on the part of the United States to check thoroughly the Indians' ability to face the responsibility of administering a trust, and to provide ample safeguards in the treaty for the supervision and accountability of the trustees so as to prevent mismanagement. The Commission, therefore, con-

cluded that the United States was liable to appellant for "whatever profit, based on bona-fide first sales, that was made by Hutchinson and Kalloch" on the resale of the approximately 5,000-acre tract. In computing the amount of damages, the Commission regarded the sale by Hutchinson to the Company of the 640-acre townsite and the sale by Kalloch to Lathrop of half interest in the 4,350-acre tract as bona fide. With respect to the 640-acre townsite, the Commission awarded appellant $9,200, which is the difference between the $10,000 paid by the Company and the $800 paid by Young. As to the 4,350-acre tract, the Commission awarded appellant one-half of the amounts realized by Kalloch and Lathrop from sale of this land. The Commission also awarded appellant the $30,603.94, plus interest, which was unaccounted for by Hutchinson after part of the trust lands was sold by him. The Commission's final award also included several other items which are not here in dispute.

Appellant contends that the following modifications of the Commission's final award should be adopted by this court:

(A) To increase the award with respect to the profit upon the sale of the townsite from $9,200 to $225,749.98, because the sale from Hutchinson to the Company (and some of the resale by the Company) was not bona fide.

(B) To increase the award with respect to the sale of 4,350 acres of school lands from $21,894.31 to $50,713.62, because the sale from Kalloch to Lathrop was not bona fide.

(C) To add an amount of $19,466.76 as additional damages, plus interest, representing the profit made by the University with respect to the trust lands conveyed to the University under the 1867 Treaty.

(D) To award additional damages, to be measured by appropriate interest rates, on that portion of the award which represents the proceeds of the sale of the 15,000 acres intended as an endowment for the school.

We conclude that appellant has not made out its case with respect to the last three contentions above. Therefore, we affirm the final award with respect to these items, based on the reasons adequately stated in the opinions of the Commission below.[3] However, we are in substantial agreement with appellant's first contention in that the sale from Hutchinson to the Company was not a bona fide transaction.

The Commission has held that the United States is liable to appellant for "whatever profit, based on bona-fide first sales, that was made by Hutchinson and Kalloch" on the resale of the 5,000-acre tract which included the townsite. Appellant does not dispute this holding but contends that the Commission's conclusion, that the sale by Hutchinson to the Company of the 640-acre townsite was a bona fide transaction, is not warranted. We think that appellant is correct in its contention. The Commission said the fact that Hutchinson was an officer of the Company falls far short of imputing any cloud upon the transaction, and that the $10,000 consideration paid by the Company for the 640 acres may well have been the fair market value of the unimproved townsite. That may be so, but a person having notice of breach of trust by his transferror is not a bona fide purchaser. Restatement (Second), Trusts § 288 (1959). We believe that the Company had actual or constructive notice of the breach of trust committed by Hutchinson before the transfer in question.

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[3] Ind. Cl. Comm. 874 (1960) and 11 Ind. Cl. Comm. 566 (1962).

The Company itself was formed to exploit the lands of the Indians, and it knew that these were Ottawa lands. The Company, or its agents, knew, or should have known, that Hutchinson was the Indian Agent. Therefore, it was incumbent upon the Company, or its agents, to make inquiries when the Indian Agent in his personal capacity, and not as an agent of the Government, conveyed Indian land to the Company. Had the Company made inquiries with respect to this land, we have no doubt that the Company would have found that Hutchinson breached his trust by making huge profits in dealing with trust property. The general rule is that a person has notice of a breach of trust if he knows, or should know, of the breach of trust. Restatement (Second), Trusts § 297(a) (1959). Under these circumstances, we hold that, as a matter of law, the Company was not a bona fide purchaser.

The law frowns upon anything that bears any semblance to a conflict of interest. This is especially true where there is a trust relationship. The law is even more exacting where there is a relationship akin to that of guardian and ward. That no man can serve two masters is gospel as well as law. It is true in life as in law. There can be no halfway ground. This rule is as exacting as arithmetic which was referred to by an ancient philosopher as "the first of the sciences and the mother of safety."

Involved here are three men all of whom occupied a trust relationship and one of them represented the Government in its dealings with the Indians. They organized a townsite Company of which they owned a substantial part and which they operated. They first sold through an intermediary the planned townsite location of 640 acres for the price of $800 to one of the trustees who was the Indian Agent employed by the Government. He soon transferred that tract to the townsite Company for a con-

sideration of $10,000. The Company, in turn, sold the lots at a profit of many times the original cost.

Who should retain these profits? The appellee says the profits belonged to the townsite Company. It claims the Company paid the full value of the property at the time of the sale. But whether or not this was true, the question arises: Did the trustees, who were also officials of the Company, know something the public generally did not know? And did they learn these prospects while in their representative relationship with the tribe and the Government? Surely their position must have contributed to that knowledge. The facts preclude any other reasonable conclusion. Does anyone believe that they would have orgainzed the Company and made these profits, but for the knowledge and prospects gleaned from that relationship?

The law requires what is called uberrima fides, the highest good faith, in matters of this kind. There can be no shading. This is not a sudden turn in the law. It is based upon centuries of human experience. The principle has been a gradual growth. It recognizes the frailties of human nature and curtains off any possibility of personal profit from such a confidential relationship. There is thus a basic reason for applying this principle of law. It has been found, through these years of revealing experience and continuing effort to perfect the law, that the only practical way to assure proper operation is to foreclose any possibility of the trusted representative's making a personal profit out of transactions that are linked directly or indirectly to such a relationship. They are limited to the allowance of reasonable pay for work actually performed under the assignment.

The parties have stipulated that the total consideration received by the Company, from the sale of the town-

site, was $116,172.68. Appellant is, therefore, entitled to a judgment of $115,372.68 ($116,172.68 minus the $800 already paid to the school board) with respect to the townsite.

Appellant is not satisfied with the above judgment but contends that the considerations paid to the Company by two groups of purchasers were not adequate, and that the beneficiaries of the school trust were entitled to recover the value of the land in the hands of a transferee who is not a bona fide purchaser. The records show that 147 lots were transferred for $3,000 to the Commissioner of Indian Affairs, William P. Dole, who negotiated the 1862 treaty with the Ottawas, and 2,235 lots were transferred to shareholders of the Company at a total recited consideration of $36,675. It is the appellant's position that the transfers of lots to shareholders were not sales at all but in effect divisions of the assets of the Company among its shareholders, and that the transfer of lots to Dole was a highly questionable transaction by a Government official which prevents us from being able to determine whether that transaction was fair or not. Appellant contends that an amount, which is the difference between the $39,675 paid for the 2,382 lots and the then fair value of these lots, should be added to the total consideration received by the Company.

While transactions of this type may in some instances be questionable depending on the facts and circumstances of a particular case, we conclude that appellant has not carried its burden of demonstrating to us that the determination of the Indian Claims Commission was erroneous in this case. Accordingly, appellant is not entitled to more than the $115,372.68 with respect to the townsite.

The opinions and final award of the Indian Claims Commission are affirmed in part and reversed in part. Appellant is entitled to a judgment of $115,372.68 with re-

spect to the townsite (corresponding to Item 7 of the final award of the Commission). As thus modified, the decision of the Indian Claims Commission is affirmed, and the case is remanded to the Commission for the entry of an appropriate order.

*Affirmed in part and reversed in part.*

# In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 478

THE OTTAWA TRIBE, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The findings and opinions of the Indian Claims Commission are reported at 8 Ind. Cl. Comm. 831, 874; 9 Ind. Cl. Comm. 98; and 11 Ind. Cl. Comm. 550, 566. The opinion of the Court of Claims is not yet reported, but is reproduced at pp. 45a–54a of Petitioners' Appendix.

### JURISDICTION

The judgment of the Court of Claims was entered on June 12, 1964. The petition for a writ of certiorari was filed on September 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1) and Section 20(c) of the Indian Claims Com-

mission Act of August 13, 1946, c. 959, 60 Stat. 1049, 1054, 25 U.S.C. 70s(c).

## QUESTION PRESENTED

Whether the Indian Claims Commission and the Court of Claims properly denied interest on a judgment against the United States under the provision of the Indian Claims Commission Act which allows recovery for claims based upon "fair and honorable dealings."

## STATUTE INVOLVED

The pertinent provision of the Indian Claims Commission Act, 60 Stat. 1050, 25 U.S.C. 70a, is as follows:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: * * * (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

## STATEMENT

By the Treaty of August 30, 1831, 7 Stat. 359, the United States conveyed to the Ottawa Tribe of Indians a 75,000 acre reservation in what is now Franklin County, Kansas. Subsequently, the Ottawas made numerous proposals to the United States for a new treaty that would individualize part of the land and allow the sale of the balance (8 Ind. Cl. Comm. at

832–835, Fdgs. 4–6).[1] These proposals culminated in the treaty of June 24, 1862, 12 Stat. 1237, whereby all tribal members received an allotment of land, and, of the remaining land, 20,640 acres were set aside to endow permanently a school for the benefit of the tribe and 30,000 acres were to be sold with the proceeds held in trust for the tribe (8 Ind. Cl. Comm. 834–838, Fdgs. 6–10).

The present controversy involves 15,000 of the 20,640 acres of school land and the provisions for their sale as set out in Article VI of the Treaty. 12 Stat. 1238–1239 (Pet. App. 3). Of the 20,640 acres, 640 acres were to be retained for the school site, 5,000 acres were to be sold to provide funds for the school building, and 15,000 acres were to be sold, the proceeds kept intact and invested in loans secured by real estate, and the interest applied to the support of the school (8 Ind. Cl. Comm. 835–836, Fdg. 7; see Pet. App. 3). Article VI also established a school board of seven trustees, four Indians and three white men, who were given full authority to sell the school lands and to manage and invest the proceeds as called for in the Treaty.

The Ottawa Tribe brought this suit before the Indian Claims Commission seeking recovery for numerous abuses suffered as a result of this allotment and sale of their lands. The Commission found that

[1] Congress had provided by statute for negotiation with the midwestern tribes in order to open more lands for settlement. Act of March 3, 1853, 10 Stat. 226; the Kansas-Nebraska Act, 10 Stat. 277; the Act of July 22, 1854, 10 Stat. 308.

the 15,000 acres intended to be an endowment for the school were dissipated by the trustees in various ways and that the tribe received only $4,934.25 from the proceeds of their sale (Pet. App. 48a).[2] The Commission ruled that the United States had no legal obligation with respect to the sale of the school lands because, under the Treaty, the school board was an independent body over which the United States had no control (8 Ind. Cl. Comm. 883; Pet. App. 9a). However, the Commission held that the United States had a moral obligation to see that the 1862 Treaty contained safeguards for the protection of the educational trust and that this moral obligation was not fulfilled (8 Ind. Cl. Comm. 884; Pet. App. 10a). Consequently, under the "fair and honorable dealings" provision of 25 U.S.C. 70a, *supra*, p. 2, recovery of $75,577.42 was allowed as the value of the 15,000 acres in the educational trust (Pet. App. 44a, items 3, 9, 6). Petitioners also contended that the Commission should award interest on the principal sum recovered for the 15,000 acres in order to compensate for the failure of the school board to invest the proceeds in the manner called for in the Treaty. However, the Commission refused to allow interest against the United States on the recovery based on violation of a moral obligation (8 Ind. Cl. Comm. 898; 9 Ind. Cl. Comm. 98, 101–102; Pet. App. 24a) and the Court of Claims adopted the ruling of the Commission in this respect (Pet. App. 50a). The present petition challenges that ruling.

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[2] The school was constructed, was maintained and is in operation today (Pet. App. 47a).

## ARGUMENT

The decision of the Court of Claims is plainly correct and there is no reason for this Court to review it.

1. This Court and the Court of Claims have long adhered to the traditional rule that interest on claims against the United States cannot be recovered, absent express congressional direction to the contrary. *United States* v. *Tillamooks,* 341 U.S. 48; *Assiniboine Indian Tribe* v. *United States,* 121 F. Supp. 906, 909–912 (C. Cls.), certiorari denied, 348 U.S. 863; *Blackfeet & Gros Ventre Tribes* v. *United States,* 119 F. Supp. 161, 167–168 (C. Cls.), certiorari denied, 348 U.S. 835; *Loyal Band or Group of Creek Indians* v. *United States,* 97 F. Supp. 426, 431 (C. Cls.), certiorari denied, 342 U.S. 813; *Osage Nation of Indians* v. *United States,* 97 F. Supp. 381, 424 (C. Cls.), certiorari denied, 342 U.S. 896. The only exception to this rule is when the taking entitles the claimant to just compensation under the Fifth Amendment. *United States* v. *Tillamooks, supra,* at p. 49. The government's immunity from liability for interest rests upon the principle that the United States' consent to be sued does not include consent to also pay interest. See *United States* v. *Hotel Co.,* 329 U.S. 585, 588. Since nothing in the Indian Claims Commission Act, or any other statute, provides for the payment of interest upon a claim grounded in the fair and honorable dealings clause of 25 U.S.C. 70a, *supra,* p. 2, and since the award was not for a Fifth Amendment taking, interest was properly denied.

2. Petitioners do not deny the established rule just stated (Pet. 6–8), but they argue for a special exception in favor of Indian tribes (Pet. 9–15). There is no basis for such an exception. Certainly nothing in the "fair and honorable dealings" provision justifies an inference that Congress directed payment of interest in such cases. The provision is itself novel to our jurisprudence and the attempt to expand it by implication is contrary to basic principles of statutory interpretation. See *Shaw* v. *Railroad Co.*, 101 U.S. 557, 565.

Petitioners' argument that Indian cession treaties may be exercises of eminent domain in disguise has no application to this case. First, the Commission found that the Ottawas made the overtures to the United States in regard to the 1862 Treaty, not that the United States forced the Treaty on the tribe (8 Ind. Cl. Comm. 832–834, Fdgs. 4, 5); there is no finding that the tribe was coerced into accepting the Treaty. Second, the damages in question arose because of the failure of the school board to execute the terms of the Treaty, not because the Treaty in some manner expropriated the Indian lands, *i.e.*, the fault was in the execution, over which the United States had no control, and not in the planning. Third, if this were some form of Fifth Amendment taking, the Commission would have found a legal liability on the part of the United States. The Commission expressly rejected such a contention (8 Ind. Cl. Comm. 883–884, Pet. App. 9a-10a; 9 Ind. Cl. Comm. 101–102, Pet. App. 28a–29a).

Finally, petitioners cannot collect interest as a substitute for damages that may have been incurred because the trustees failed to invest the trust funds. The prohibition against the payment of interest by the United States, except as expressly provided by Congress or on a Fifth Amendment taking, is all-inclusive. This Court decided that question in *Cherokee Nation* v. *United States,* 270 U.S. 476, 490: "The additional interest now claimed is sought really as damages for the delay of Congress in appropriating the sum due in 1895 as the United States promised in the 1891 agreement. But the rule as to interest against the United States does not allow us to adjudge interest damages at all. Congress must expressly provide for it or the contract must so provide." Petitioners' case is not different because the promise was to invest funds for them rather than a direct promise to pay them. Also, such an award in this case would be totally speculative. There has been no showing as to the rate of return that could be expected from investments of the type contemplated here and petitioners ask this Court to correct that failure of proof by selecting some arbitrary interest rate and applying it against the United States. Without passing on the merits of petitioners' argument if they were requesting damages measured by an interest rate that has some rational basis in the facts of the case, it is clear that they cannot collect interest here.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1964.